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No. 04-____

IN THE
Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 24, 2004

QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Lincoln Property Company and State of Wisconsin Investment Board state the following:

Lincoln Property Company is a privately held company. Lincoln Property Company has no parent company, and no publicly held company owns 10% or more of its stock.

The State of Wisconsin Investment Board ("SWIB"), incorrectly sued below as SWIB Investment Company, is an independent agency of the State of Wisconsin and, as such, has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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LINCOLN PROPERTY COMPANY AND
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PETITION FOR A WRIT OF CERTIORARI

Lincoln Property Company and State of Wisconsin Investment Board respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the district court granting petitioners' motion for summary judgment and denying respondents' motion for summary judgment (Pet. App. 22a-40a), and denying respondents' motion to remand (*id.* at 84a-93a), are unreported. The district court's opinion granting petitioners' motion to exclude the testimony of respondents' medical expert (*id.* at 42a-79a) is reported at 278 F. Supp. 2d 744. The court of appeals' opinion (Pet. App. 1a-19a) is reported at 373 F.3d 610.

JURISDICTION

The court of appeals entered its judgment on June 30, 2004. A petition for rehearing was denied on July 27, 2004. Pet. App. 97a. On October 18, 2004, Chief Justice

Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 24, 2004. *Id.* at 98a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The provisions of 28 U.S.C. §§ 1332, 1441, and 1447, and Federal Rule of Civil Procedure 17, are set forth at Pet. App. 99a-106a.

INTRODUCTION

This case raises issues of longstanding and recurring significance on a fundamental aspect of federal court jurisdiction: how the "citizenship" of parties is determined when federal jurisdiction rests on diversity of citizenship. In this case, the properly named defendants (petitioners here) are concededly diverse and should have been permitted to remove respondents' case to federal court under 28 U.S.C. § 1447. But the court of appeals *sua sponte* ordered a remand to state court. The court determined that another, non-named entity is the "real party in interest" in the litigation and that, notwithstanding respondents' failure to join or substitute that entity as a named defendant, the citizenship of that non-named entity was dispositive in destroying complete diversity between plaintiffs and defendants. The court of appeals further held that the citizenship of that non-named entity – which was a limited partnership – must be determined by its supposedly "very close nexus" to Virginia (a "nexus" ascertained without any fact-finding by the district court), rather than solely on the citizenship of its members.

The Fourth Circuit's first holding deepens an existing conflict among the circuits; the second holding creates a circuit conflict. The Fourth Circuit's errant rulings affect perhaps 5,000 diversity cases in the circuit alone among the approximately 60,000 diversity cases litigated nationwide each year. They also will have a disproportionate impact on thousands of nationwide businesses that operate through limited partnerships and do business in states comprising the Fourth Circuit. This Court's review

is urgently needed to clarify critical jurisdictional rules upon which the business community relies every day.

STATEMENT

This case arises out of lawsuits that respondents Christophe Roche and Juanita Roche filed in state court against petitioners Lincoln Property Company ("Lincoln") and State of Wisconsin Investment Board ("SWIB"), as well as INVESCO Institutional, an entity no longer involved in this litigation.[1] Respondents asserted a plethora of state statutory and common law claims for purported bodily injuries and property damage from exposure to allegedly "toxic levels of mold" at an apartment located in Westfield Village Apartments, a complex owned by SWIB and managed by EQR Lincoln Limited Partnership ("EQR"), a Lincoln affiliate.

Petitioners promptly removed the cases to the United States District Court for the Eastern District of Virginia based on diversity jurisdiction and consolidated them into a single proceeding. The complaints identified respondents as citizens and domiciliaries of Virginia. The complaints named as a defendant Lincoln, which was and is incorporated in Texas with its principal place of business in Dallas, Texas. The complaints also named as a defendant SWIB, which was and is an independent agency of Wisconsin and thus a Wisconsin citizen. As the case comes to this Court, there is no dispute that this action was properly removed by the parties actually named in the lawsuit because it fell within the original diversity jurisdiction of the district court under 28 U.S.C. §§ 1332 and 1441(a). At the time of removal, respondents did not object to removal, seek to have the case remanded to state court, or attempt to join any additional defendants to the suit.

Following petitioners' removal of the case to federal court, the parties engaged in motions practice that

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[1] On November 27, 2002, the district court dismissed INVESCO from this matter. Respondents did not challenge that order.

resulted in a substantial narrowing of respondents' claims. As to the remaining claims – negligence per se (against Lincoln and SWIB) and conversion (against Lincoln only) – petitioners filed a motion for summary judgment. Petitioners also filed a motion under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to bar the testimony of Dr. Richard Bernstein, respondents' only medical causation expert.

On April 16, 2003, the district court entered an order notifying the parties that it had granted petitioners' motions in their entirety and that the court would be issuing an order setting forth the reasons for its decision in the near future. Pet. App. 20a-21a. On July 25, 2003, the district court issued its memorandum orders granting petitioners' motions for summary judgment and excluding Dr. Bernstein's testimony. *Id.* at 22a-41a, 42a-81a.

According to respondents, after the April 16, 2003 order, they researched for the first time the propriety of removal. On April 22, 2003, respondents filed a motion seeking to remand the case to state court, asserting that the court lacked diversity jurisdiction because petitioner Lincoln, one of the entities named in the original state court complaint, allegedly was a citizen of Virginia. Respondents argued, based primarily on misconstrued deposition testimony of Lincoln representatives, that Lincoln was not a corporation, but rather a partnership called EQR that had one partner who resided in Virginia.[2]

In response to respondents' motion, petitioner Lincoln submitted a declaration from Lincoln's General Counsel

[2] In their April 22, 2003 motion, respondents relied primarily on the deposition testimony of Lincoln employees Fred Chaney and John LeBeau. Based on respondents' misunderstanding of Chaney's and LeBeau's testimony regarding Lincoln's corporate structure, respondents concluded that the Lincoln entity that they sued was not a Texas corporation, but rather a partnership with one partner who was a Virginia resident. *See* Lincoln/SWIB Opposition to Plaintiffs' Motion to Remand at 6-7 (filed Apr. 30, 2003).

Dan Jacks affirming that Lincoln, the entity sued by respondents, was a Texas corporation with its principal place of business in Texas. *See* Lincoln/SWIB Opposition to Plaintiffs' Motion to Remand at 4-5 & Ex. 1 (filed Apr. 30, 2003). In addition, Lincoln attached to the Jacks declaration its articles of incorporation, which established that Lincoln is a corporation, not a partnership. *See id.*, Ex. 1(A). That evidence thus conclusively established that Lincoln – the only defendant that had been "properly joined and served" under 28 U.S.C. § 1441 and therefore the only relevant entity for purposes of assessing diversity jurisdiction – was in fact diverse.

Moreover, to clarify why respondents' argument concerning EQR was unfounded, Lincoln also submitted evidence establishing that EQR was a limited partnership and that none of EQR's partners – general or limited – was a citizen of Virginia. *See id.*, Ex. 1. The Jacks declaration demonstrated that the general partner of EQR is Lincoln Eastern Management Corporation ("LEMC"), a Texas corporation with its principal place of business in Dallas, Texas, and its limited partner is Lincoln Placeholder Limited Partnership ("LPLP"). *See id.* The Jacks declaration further detailed the citizenship of those entities by attaching partnership and corporate documents establishing that LPLP's general partner is LEMC and its limited partner is Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Dallas, Texas. *See id.*[3] Respondents did not challenge that evidence or the briefing on that issue.[4]

[3] A chart setting forth the relevant Lincoln entities in diagrammatic form is reproduced at Pet. App. 96a.

[4] In their motion for leave to file a supplemental brief, respondents challenged only the fact that they believed that EQR had its "principal place of business" in Virginia. *See* Plaintiffs' Motion for Leave to File Supplemental Brief at 3 (filed June 13, 2003). In determining the citizenship of a partnership, however, the "principal place of business" of the partnership is irrelevant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 192-93 (1990).

Respondents did, however, subsequently add a new argument to their motion to remand, asserting that the court also lacked jurisdiction over SWIB because it allegedly was an "arm" of the State of Wisconsin.

On August 11, 2003, the district court entered an order denying respondents' motions to remand or for relief from judgment. Pet. App. 84a-93a. The court held that it had diversity jurisdiction over the action because Lincoln, the entity named in respondents' complaints, was a Texas corporation:

> [T]he entity [respondents] identified in their [complaint] filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas, 72501. This corporation is a Texas corporation with its principal place of business in Texas. Therefore, the entity that [respondents] sued is a Texas corporation.

Id. at 86a-87a (citation omitted). The court also rejected respondents' assertions with respect to EQR: "[E]ven if EQR is the proper defendant in this case (although [respondents] did not sue this entity), EQR is not a citizen of Virginia." *Id.* at 87a. Based on the unrebutted evidence submitted by Lincoln concerning the citizenship of EQR, the district court held that

> EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation, which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from [respondents].

Id. at 87a-88a (citations omitted).

Respondents appealed. In their arguments to the Fourth Circuit, respondents did not challenge the district court's ruling that Lincoln, the properly named defendant in the action, was diverse. Nor did respondents challenge the district court's subsequent holding that EQR, the nonparty that had been the subject of respondents' speculation, was also diverse. Rather, respondents raised issues on appeal that the Fourth Circuit subsequently did not address and that are not at issue in this Court.[5] Accordingly, in their briefs to the court of appeals, none of the parties presented arguments or evidence concerning the citizenship of Lincoln or any of its affiliates.

Nevertheless, on June 30, 2004, the Fourth Circuit entered a *sua sponte* ruling that petitioner Lincoln had not established diversity jurisdiction with respect to "some Lincoln entity related to this action." *Id.* at 11a. That issue had never been raised by respondents, either before the district court or on appeal. The court perceived its duty to be to ascertain the "real party in interest" on the defendants' side of the case, notwithstanding that respondents had not sued or joined any other defendant. *Id.* at 9a-10a. It then identified the supposed "real party in interest," which it thought was EQR because that entity "receives the management fees for Westfield Village Apartments." *Id.* at 11a-12a (internal quotation marks omitted).

Having identified EQR as the "real" interested defendant, the court of appeals then assumed that Lincoln had failed to disclose EQR's limited partners. *Id.* at 12a. Left

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[5] Specifically, respondents argued that the district court erred in dismissing their claims for breach of the implied warranty of habitability, conversion, and punitive damages. They also claimed that the district court should not have barred the testimony of their purported medical expert and that it should have held that SWIB was an arm of the State of Wisconsin.

with what it perceived to be an evidentiary gap, the court held that Lincoln had failed to meet "its burden of establishing diversity." *Id.* at 13a. It also viewed the evidence as suggesting that EQR was not diverse because it had a "very close nexus" with Virginia. *Id.* at 16a. Rather than remand for fact-finding in the district court on the issue of EQR's citizenship, which the court of appeals had raised *sua sponte* without giving the parties an opportunity for briefing, the Fourth Circuit divested the district court of any meaningful role on remand by ordering this case to be remanded to state court.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit issued two rulings in conflict with other circuits on matters of critical interest to the business community. The first issue is whether a court should examine the "real party in interest" in determining how to assess a defendant's citizenship for diversity purposes. The Fourth Circuit, joined by the Seventh Circuit and one panel of the Ninth Circuit, deepens an acknowledged conflict by holding that a court may look beyond the named defendants in a complaint to determine whether some entity *not named in the complaint* would destroy complete diversity of citizenship, and therefore the basis for federal jurisdiction. A clear majority of circuits, on the other hand, hold that the "real party in interest" analysis applies only to determining a *plaintiff's* citizenship and not a defendant's at all, and that a court does *not* look beyond the named defendants in a complaint to defeat complete diversity. Resolution of that conflict is clearly needed in light of the approximately 60,000 cases filed each year in federal courts that invoke diversity of citizenship as the basis of jurisdiction.

The Fourth Circuit also created a circuit conflict on a second point of special interest to businesses that operate in multiple states: whether a limited partnership's citizenship should be assessed by looking beyond the citizenship of its members to determining whether the partnership has a "very close nexus" (Pet. App. 16a) to the

plaintiff's state of citizenship. In holding that such a "nexus" analysis is compelled, the Fourth Circuit's holding flatly conflicts with those of the First, Second, and D.C. Circuits, which have expressly rejected that very approach in cases involving property development partnerships that operate in multiple states. The Fourth Circuit's erroneous expansion of the "citizenship" concept to include the entity's factual "nexus" to a state has obvious and detrimental consequences to partnerships with nationwide or regional operations that will be deprived of their right to a federal forum because they have a "nexus" with many jurisdictions. Because there are no remaining issues to be resolved prior to relitigating the case in its entirety in state court, this case presents an ideal vehicle for this Court to bring needed clarity to bedrock principles invoked every day in the federal courts.

I. THE FOURTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER THE CITIZENSHIP OF NON-PARTIES IS RELEVANT IN ASSESSING THE DIVERSITY OF DEFENDANTS NAMED IN A LAWSUIT

A. The Citizenship Of Non-Parties As Putative Defendants Is Irrelevant To Determining Whether Diversity Is Present

The court of appeals fundamentally misunderstood the purpose of a "real party in interest" analysis in ordering this case, which had already been fully litigated to a successful outcome for petitioners, to be remanded to state court to begin anew. The removal statute permits a defendant to remove a case brought in state court when the following conditions are satisfied: "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). Under well-settled law, the diversity between plaintiffs and defendants must be "complete." *See, e.g., Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)

(construing predecessor statute to current 28 U.S.C. § 1332).

The statutory requisites of Section 1441(b) are readily satisfied here. Petitioners Lincoln and SWIB are "parties in interest" in the litigation. They were "properly joined and served as defendants." And neither is a "citizen of the State in which such action is brought." Petitioner Lincoln is a Texas corporation with its principal place of business in Dallas, Texas, and SWIB is a citizen of Wisconsin. Respondents are citizens of Virginia. Thus, based on the plain language of Section 1441(b), the court of appeals should have affirmed the district court's ruling that the case was properly removed. The court had no statutory basis for examining the citizenship of any entity that had not been "properly joined and served as [a] defendant[]" in deciding whether removal under Section 1441(b) was proper.

B. The Court's Error Stemmed From A Misunderstanding Of The "Real Party In Interest" Concept

1. Although the Fourth Circuit did not explain the statutory basis for its analysis, the court appears to have taken the words "parties in interest" in Section 1441(b) and conflated that phrase with the concept of "real party in interest," a term used in Federal Rule of Civil Procedure 17(a). In so doing, the court of appeals explicitly based its holding on the citizenship of "some Lincoln entity related to this action," Pet. App. 11a, which the court speculated was the "real party in interest" in the case.

That analysis is deeply flawed. First, it ignores the remaining words in Section 1441(b), which limits the class of "parties in interest" to those that are "properly joined and served as defendants." Under the plain language of Section 1441(b), there was simply no basis for the court to look outside the named defendants in respondents' action to ascertain the citizenship of "some Lincoln entity related to this action." Pet. App. 11a. EQR, the Lincoln affiliate that the Fourth Circuit thought was the "real party in

interest," was never "joined and served as [a] defendant[]" in this lawsuit. Its citizenship is therefore irrelevant to a determination of complete diversity of the defendants that were named in the suit, Lincoln and SWIB.

Second, the court misunderstood how the "real party in interest" concept properly applies. That term is not used to determine whether the defendants are the right parties that may remove an action. Rather, the "real party in interest" analysis in Federal Rule of Civil Procedure 17(a) requires a court to determine that "[e]very action shall be *prosecuted* in the name of the real party in interest." Fed. R. Civ. P. 17(a) (emphasis added). As Professors Wright, Miller, and Kane explain, "[b]y its very nature, Rule 17(a) applies only to those who are asserting a claim." 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 339 (2d ed. 1990). Where a defendant does not assert a counterclaim or third-party claim, as in this case, the "real party in interest" analysis simply is irrelevant in determining the status or citizenship of the named defendants to the lawsuit.

The purpose behind the "real party in interest" analysis is to protect defendants from potentially duplicative liability when sued by a plaintiff that does not actually hold any substantive right to recover. Here, respondents, as masters of their complaint, could choose to sue whomever they wished. They chose to sue Lincoln, the entity whose trade names were used in connection with the management of Westfield Village. Lincoln has an obvious interest in this lawsuit. It has answered and defended the lawsuit and has never even suggested that it would be unwilling or unable to pay any judgment that might be entered against it on the claims asserted in respondents' complaints. Nor is there any other reason artificially to revise the identity of the actual parties to this suit. Respondents' decision to sue a fully diverse corporation was theirs alone. There was no basis in law for the court

below to speculate about the existence of other possible defendants as a basis for destroying complete diversity.

2. The court's error derived from a grave misunderstanding of this Court's cases that have addressed the principle that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be *real and substantial parties* to the controversy." Pet. App. 4a (quoting *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980)). This Court in *Navarro Savings*, however, invoked the notion of "real parties to the controversy" (446 U.S. at 461) to determine whether the plaintiff trustees who had invoked diversity jurisdiction under 28 U.S.C. § 1332(a)(1) were the real parties in interest in bringing the lawsuit. In *Navarro Savings*, the defendants sought to defeat complete diversity by asserting that a court must consider the citizenship of the beneficial shareholders of a trust even though they were non-parties who were aligned with the plaintiffs to the complaint. *Id.* at 460. But this Court rejected that argument, stressing that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. The trustees in this case have such powers." *Id.* at 464 (footnote omitted). The Court's holding in *Navarro Savings* thus rested on the unique structure of a trust; the "real party in interest" analysis was used to ascertain the citizenship of *plaintiffs*; the Court looked at the citizenship of third parties to determine whether the fact that they could benefit from the recovery required consideration of their citizenship; and the judgment in fact *upheld* complete diversity. The Fourth Circuit therefore had no basis for concluding that *Navarro Savings* authorizes a court to look outside the complaint and beyond the named defendants to determine whether complete diversity has been destroyed.

In purporting to rest its announced rule on the decisions of "[n]early all federal circuit courts" that supposedly "have applied the 'real party in interest standard' when

determining whether true diversity of citizenship exists," Pet. App. 5a, the court below invoked cases that involve starkly different situations. In *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751-52 (5th Cir. 1996) (cited at Pet. App. 5a), for example, the court addressed the very different situation of when a plaintiff seeks to join a non-diverse defendant in an attempt to defeat complete diversity. The Fifth Circuit held that, if the removing defendant alleges that the plaintiff has "fraudulently joined" that non-diverse defendant, the removing defendant bears the burden of showing that "there is *no possibility* that the plaintiff could state a cause of action against the non-diverse defendants." 99 F.3d at 751-52. That principle has no application here, because respondents never sought – fraudulently or legitimately – to join any non-diverse defendant to their suit.

The Fourth Circuit's invocation (Pet. App. 5a) of *Hughes-Bechtol, Inc. v. West Virginia Board of Regents*, 737 F.2d 540 (6th Cir. 1984), is even farther afield. That case addressed whether a suit against the West Virginia Board of Regents could be removed under diversity jurisdiction. In concluding that the answer was "no," the Sixth Circuit held merely that the Board of Regents was an agency or alter ego of the State of West Virginia and not a "citizen" of the State for diversity purposes. *Id.* at 543-44. That holding provides no support for the Fourth Circuit's conclusion here that Lincoln's citizenship could be disregarded and that the citizenship of a distinct entity with no legal relationship to Lincoln not sued by respondents was *dispositive* in determining complete diversity.[6]

The court's reliance (Pet. App. 5a) on *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), is also misplaced. In that case, the Seventh Circuit held that a

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[6] Nor is *Hughes-Bechtol* relevant to SWIB's status (an issue upon which the Fourth Circuit did not pass), because Wisconsin courts have recognized that SWIB is an "independent going concern." *See Bahr v. State Inv. Bd.*, 521 N.W.2d 152, 186 Wis. 2d 379 (Ct. App. 1994).

suit brought by a state officer in his "official capacity" did not support a finding of diversity jurisdiction because the suit was, in effect, "on behalf of the State of Illinois" and not on behalf of the state officer in his "individual capacity." *Id.* at 250. Thus, none of the cases relied on by the Fourth Circuit – *Sid Richardson*, *Hughes-Bechtol*, or *Nuclear Engineering* – supports the judgment below that a court can look beyond the named defendants in the lawsuit to destroy complete diversity.[7]

Notwithstanding its erroneous reliance on those cases, the court below made abundantly clear that its judgment was not that of a wayward panel. Rather, the court of appeals rested on Fourth Circuit precedent for the notion that diversity jurisdiction may be defeated if a necessary party would destroy diversity. *See* Pet. App. 5a (citing *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998)). Thus, it is now the established rule in the Fourth Circuit that a defendant who removes a case bears the burden of establishing that any potential "real party in interest" not named or joined as a defendant would not in fact destroy complete diversity.

C. The Fourth Circuit's Judgment Deepens An Existing Conflict Among The Circuits On Whether A Non-Named Defendant Is A "Real Party In Interest" For Determining Diversity

1. Two circuits are aligned with the Fourth Circuit's rule that a court is authorized to look outside the actual named parties to the complaint to determine whether complete diversity has been established. In *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir. 1998),

[7] The other case on which the court below relied, *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987) (cited at Pet. App. 5a), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991), arguably *does* support the Fourth Circuit's judgment here. We address that case in more detail below, where we highlight the deep confusion among the courts of appeals in determining the circumstances when complete diversity may be destroyed by a non-named defendant to the lawsuit. *See* pp. 20-21, *infra*.

the Seventh Circuit engaged in a virtually identical analysis. In that case, an insured gas company appealed from a judgment in favor of various insurers, including Lloyd's underwriting syndicates. Without prior notice to the parties, the court undertook to determine *sua sponte* whether complete diversity had been satisfied by inquiring into the citizenship of the "names" in a Lloyd's underwriting syndicate even though they were not named parties to the suit. *Id.* at 315-16. As Judge Evans' dissent makes clear, that analysis came as a complete "surprise" and was held to control the case "despite the fact that the complaint alleged an arguable basis for diversity jurisdiction, the answers conceded jurisdiction, the district judge nurtured the case for three years and the parties came here looking for answers to questions on the merits of this complex litigation." *Id.* at 320 (Evans, J., dissenting).

The approach of the Fourth, Seventh, and arguably the Ninth Circuits,[8] therefore, is that courts can look beyond the named defendants to determine whether complete diversity exists. As we now demonstrate, that rule has been rejected in a clear majority of the other circuits.

2. Notwithstanding the holdings of those circuits, the Second, Third, Fifth, Sixth, Eighth, and Tenth Circuits have recognized that the "real party in interest" concept applies only to determining whether the party bringing the claim has a right to seek relief or that a court should not look outside the complaint to decide that putative non-named defendants would destroy complete diversity. The Fifth and Sixth Circuits have explicitly rejected both underpinnings of the Fourth Circuit's erroneous judgment here. The conflict is thus mature and deep, and in need of immediate resolution.

In a decision that sets forth the proper analysis in a manner directly in conflict with the Fourth Circuit here, the Sixth Circuit has explained that "[t]he real party in interest analysis turns upon whether the substantive law

[8] *See* p. 20, *infra*.

creating the right being sued upon affords the party bringing the suit a substantive right to relief." *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 43 (6th Cir. 1994). Thus, the "real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law," *i.e.*, the plaintiff or counterclaim defendant. *Id.* at 42-43.[9] The Sixth Circuit further applied that analysis in *Layne* to hold that, because the defendants' counterclaim named only the underwriters of insurance, and not the syndicates, the defendants' decision to name the underwriters "seems to be a clear election to sue" certain parties and not others. *Id.* at 43-44. Because the counterclaim named parties that "are completely diverse," jurisdiction under Section 1332(a)(2) "was properly invoked." *Id.* at 44.

The Fifth Circuit has likewise held that "[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990). More recently, that court has reaffirmed that the fact that business entities are structured "such that the other [entity is] affected by the judgment against [the defendant] does not bring [that] other part[y] before the court *or make [it] relevant* for the citizenship determination." *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003) (emphasis added), *cert. denied*, 124 S. Ct. 2421 (2004). Indeed, "[t]he 'real party to the controversy' test does not require a federal court to consider the citizenship of non-parties who have an interest in the litigation or might be affected by the judgment." *Id.* at 865 n.10. Yet here the Fourth Circuit not only considered the citizenship of such a non-party; it actively sought out that

[9] In *Indiana Gas*, the Seventh Circuit explicitly recognized that its holding conflicted with the Sixth Circuit's in *Layne*. *See* 141 F.3d at 319 ("[w]e disagree with *Layne*"); *id.* at 320 (Evans, J., dissenting) (noting that the majority's treatment of *Layne* "creat[es] a conflict among the circuits"). That conflict has only deepened. *See* pp. 17-18, *infra*.

non-party to create a basis for declaring *sua sponte* that diversity jurisdiction was improper.[10]

Other circuits agree with that position and hold that a court must assess the "real party in interest" only to determine whether a *claimant* is the proper party to pursue a cause of action – and *not* to judge whether a non-named party defendant would destroy complete diversity. *See, e.g., Esposito v. United States*, 368 F.3d 1271, 1273 (10th Cir. 2004) (decedent's right to sue passed to "real party in interest [who] is determined by referring to the governing substantive law"); *Consul General v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003) ("The real party in interest is a party who, under governing substantive law, possesses the rights to be enforced.").

In correctly limiting the "real party in interest" analysis to assessing the plaintiff's citizenship, other circuits have held that complete diversity may not be destroyed by a plaintiff seeking to invoke the citizenship of non-parties whose interests are aligned with the named defendants. As the master of its complaint, the plaintiff can sue such potential defendants (unless to do so would violate the rule against fraudulent joinder). Thus, in direct conflict with the Seventh Circuit's approach in *Indiana Gas* – and now the decision below – the Second, Third, and Fifth Circuits adhere to the approach adopted by the Sixth Circuit in *Layne*, 26 F.3d at 43-44 (holding that plaintiffs' election to sue underwriters as named defendants precluded any need to assess citizenship of any other entities in determining citizenship under diversity jurisdiction). *See*

[10] This Court has previously acknowledged that, once a case has been litigated to conclusion in federal district court, the judgment on the merits should not be disturbed absent good reason for doing so. For example, in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), the Court reversed a decision of the Fifth Circuit that had ordered a fully litigated case dismissed because of defects in removal, and instructed that following a decision on the merits "in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75 (parallel citations omitted).

E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 939 (2d Cir. 1998) (holding that, when an underwriter is properly sued only in an individual capacity, the relevant citizenship is that of the underwriter alone and court does not look beyond the named defendants in the complaint to destroy complete diversity); *Corfield*, 355 F.3d at 863 (expressly agreeing with *Squibb*'s reasoning); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 223 & n.16 (3d Cir. 1999) (allowing suit to proceed against just one Lloyd's underwriter and "perceiv[ing] no reason why Chemical Leaman should not be entitled to sue less than all of the names if it so chooses"). In *Indiana Gas*, by contrast, the Seventh Circuit held that the citizenship of all names in an underwriting syndicate must be taken into account in determining the propriety of diversity jurisdiction. 141 F.3d at 319.

The majority of the circuits thus agree that the "real party in interest" inquiry is intended to stop plaintiffs from including non-diverse co-plaintiffs who have no interest in the outcome of the lawsuit, but who are included solely for the purpose of destroying complete diversity. *See, e.g., Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977) ("[I]f the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction.") (citing *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182 (1924)).[11] That purpose, of course, is not implicated here, because Lincoln has never contested that it is a properly named defendant; Lincoln's objection to the suit is that it has no substantive merit.

In the decision below, the Fourth Circuit clearly aligned itself with the Seventh Circuit's approach. A clear majority of circuits, however, have all acknowledged that a

[11] As the court further explained, a plaintiff's effort to sue a non-diverse defendant that has no interest in the outcome of the dispute is handled under the concept of "fraudulent joinder." 556 F.2d at 404 & n.4.

plaintiff can properly choose to sue a particular defendant without also enmeshing all other entities that may be associated, contractually or otherwise, with that defendant. However, the Fourth and Seventh Circuits functionally treat groups of related entities as one potential defendant, such that, if one of those companies is sued, the citizenship of related entities will be assessed to determine whether the "real party in interest" is completely diverse from the plaintiffs. And if that unnamed, related entity happens to be of non-diverse citizenship, diversity will be destroyed. In that way, the Fourth Circuit (as did the Seventh Circuit) makes the citizenship of a group of related entities turn upon the citizenships of each, rather than the citizenship of the entity actually sued. The Court should grant certiorari to correct this erroneous view, and confirm the proper rule applied by a majority of the circuits.

D. The Ninth Circuit's Divergent Approaches Both Support And Reject The Fourth Circuit's Rule

In cases cited by the court below, albeit without any acknowledgment that they point in opposite directions, the Ninth Circuit has issued judgments that both support and reject the Fourth Circuit's approach, thus signaling that the confusion among the courts of appeals is both real and in need of this Court's clarification. As then-Judge Kennedy explained, "[t]he real party in interest concept is correctly applied *only* to those persons prosecuting an action, not to a defendant." *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1173 n.2 (9th Cir. 1979) (Kennedy, J.) (emphasis added). *See also Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1095 (9th Cir. 2003) (dismissing case for lack of subject-matter jurisdiction when non-diverse insured, rather than diverse insurance company, was proper plaintiff as the real party in interest).

In *Simpson*, the Ninth Circuit found that diversity jurisdiction was proper because, as here, the plaintiff had "chose[n] to sue the Rhode Island parent corporation"

rather than another, non-diverse affiliate. 608 F.2d at 1173. Thus, because "the parties are diverse and the amount-in-controversy requirement is satisfied, our only inquiry is whether this jurisdiction must be disregarded because the diversity is improper or collusive." *Id.* As a result of the fact that a "plaintiff ordinarily is free to decide who shall be parties to his lawsuit," *id.* at 1174, diversity jurisdiction was proper in *Simpson* even though the diverse parent corporation had a non-diverse subsidiary that arguably *could have* been named as a proper defendant in the case. The Fourth Circuit's analysis of the "real party in interest" issue therefore plainly conflicts with that employed by the Ninth Circuit in *Simpson*.

That said, a different Ninth Circuit decision also cited by the court below might be read as supporting the Fourth Circuit's rule. *See Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302 (9th Cir. 1987) (cited at Pet. App. 5a), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991). In *Rockwell International*, the Ninth Circuit *sua sponte* raised the issue of complete diversity after appeal of a judgment that had been entered in favor of an insurance defendant, USAIG. USAIG had removed the case from state court in Arizona, on the ground that the issuer of the insurance (Aetna Casualty and Surety Company) was a Connecticut citizen that had not been named as a defendant. 823 F.2d at 303. In holding that removal was improper because complete diversity had not been established, the Ninth Circuit in *Rockwell International* adopted reasoning on all fours with that of the court below: because USAIG "is a group of independent insurance companies," and because USAIG had not demonstrated that "one of the USAIG group is *not* a Delaware corporation" (where the plaintiff Rockwell was a corporate citizen), USAIG could not meet its "burden of establishing diversity." *Id.* at 304 (emphasis added).

Thus, in the Fourth and Seventh Circuits – and under one decision of the Ninth Circuit – a corporation must

prove a negative to withstand a challenge to federal diversity jurisdiction: that one of its non-named affiliated entities is *not* the "real party in interest" whose presence would destroy complete diversity. In a majority of circuits, a court would not conduct a "real party in interest" analysis at all with respect to defendants in deciding whether some non-named entity should have been sued as a defendant, and correspondingly would not permit the citizenship of non-named entities to defeat jurisdiction.

E. The Issue Is Of Surpassing Importance To The Business Community As It Creates Massive Uncertainty Over Whether Non-Named Affiliates Will Destroy Diversity Jurisdiction

Resolution of the deep circuit conflict by this Court is critically important to the business community. A huge number of diversity cases are filed each year in the federal courts. In 2003, for example, 61,656 diversity cases were commenced in the federal courts – roughly 30% of all private civil cases filed in the federal courts that year. Given that approximately 8.5% of all civil cases each year are litigated in the Fourth Circuit, as many as 5,000 diversity cases filed each year are potentially affected by the decision below.

In each of those thousands of cases, entities such as corporations or limited partnerships that are parties to the suit will be subject to major uncertainties with respect to jurisdiction. In many cases, as here, a group of affiliated entities is doing business utilizing one or more such business organizations. Should the Fourth Circuit's rule stand, companies with the kinds of routine structures utilized by Lincoln and EQR will face the prospect of being sent to state court, and perhaps even having a final judgment in federal court vacated because of the belated "discovery" of a non-diverse affiliate that a plaintiff then asserts was the proper defendant (or perhaps even only *a* proper defendant) in the first place. In those diversity cases, the clear and certain rule followed by courts that understand the role of the "real party in interest" rule –

that the only relevant parties for purposes of diversity jurisdiction are those that have actually been named in the pleadings – will be replaced by uncertainty as to exactly which affiliated entities may someday be declared to be the "real party in interest."

II. THE FOURTH CIRCUIT'S JUDGMENT CREATES A CONFLICT OVER WHETHER THE CITIZENSHIP OF A LIMITED PARTNERSHIP IS DETERMINED THROUGH ANALYSIS OF WHETHER IT HAS A "VERY CLOSE NEXUS" WITH THE STATE

Even if it was proper to consider EQR at all – a non-named limited partnership that respondents never joined to the suit despite having had every opportunity to do so – the Fourth Circuit committed a second error that creates a conflict among the courts of appeals on an issue of great significance: whether a limited partnership's citizenship is to be determined for diversity purposes not by the citizenship of its partners, but by whether the partnership's activities create a "very close nexus" with the state. Pet. App. 16a. The Fourth Circuit's minority approach has substantial ramifications for the business community.

A. The Court Of Appeals Erred In Taking Into Account Limited Partnership EQR's "Nexus" Of Activities In Addition To The Citizenship Of Its Partners

In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), this Court held that a court must look to the citizenship of each of the partners in a limited partnership, both limited and general, in determining whether complete diversity exists. *Id.* at 195. The Court "reject[ed] the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members." *Id.* Nowhere did the Court suggest that a court may look beyond the entity's membership and assess the nature of the entity's activities in a state in determining its citizenship.

Indeed, such a requirement is completely illogical and contrary to the notion of an entity's citizenship, which is the statutory concept that must be applied. Section 1332(a)(1) expressly provides that diversity jurisdiction is only available for "citizens of different States." 28 U.S.C. § 1332(a)(1). A corporation establishes its "citizenship" in a state by filing its articles of incorporation with the Secretary of State. *Id.* § 1332(c)(1).

In *Carden*, this Court stressed that the citizenship of a limited partnership is not treated the same way as a corporation. Rather, the citizenship of a limited partnership must be judged by the citizenship of its members and not just by the general partner that controls the limited partnership's activities. 494 U.S. at 195. In looking beyond the citizenship of EQR's general partner and limited partner, which are not Virginia citizens, the Fourth Circuit below went well beyond the requisites laid out in *Carden* and concocted out of whole cloth an additional "nexus" factor not found in any of this Court's decisions.

B. The Fourth Circuit's Judgment Creates A Conflict Among The Circuits Over The Proper Understanding Of *Carden*

In the aftermath of *Carden*, the courts of appeals have reached conflicting judgments on how to assess the citizenship of artificial entities such as limited partnerships. This case presents an ideal vehicle for resolving that circuit conflict.

Other circuits that have confronted the issue presented here have come to a diametrically opposite conclusion from the Fourth Circuit's. In *ConnTech Development Co. v. University of Connecticut Education Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996), for example, the Second Circuit expressly rejected the very position adopted by the Fourth Circuit below. Like EQR here, in *ConnTech* a property developer was organized as a partnership "composed of corporate citizens of New Jersey and Ohio." *Id.* The defendant, a Connecticut corporation, challenged complete diversity on the ground that the developer

"should be deemed a citizen of Connecticut because [it] was established 'for the sole purpose of acting as master developer pursuant to the [Master Development Agreement]' and because [it] 'acted wholly within Connecticut.'" *Id.* The Second Circuit found those arguments to be insufficient as a basis for ignoring the actual citizenship of the property developer's partners: "[a]s no ConnTech partner is a citizen of Connecticut, ConnTech is a diverse party." *Id.*

Likewise, in *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993), the First Circuit held that a property development partnership was not a citizen of Puerto Rico, notwithstanding the fact that it was doing substantial business there and that business led to the dispute at issue in the litigation. Instead, the court held that the partnership's citizenship depended on the citizenship of its partners, which were corporations incorporated in New York and with their principal place of business in New York. *Id.* at 63-64. The court rejected the argument – adopted by the Fourth Circuit below – that a corporate partner's "principal place of business" becomes the state where the partnership is engaging in the business activities giving rise to the litigation. *Id.* at 63 (describing the "sole corporate 'activities'" of the two corporate partners as holding or administering their assets in the New York partnership that was doing business in Puerto Rico and holding those activities to be insufficient to destroy complete diversity in a suit with a Puerto Rico construction company). On the facts here, EQR's partners – LEMC and LPLP – are in a precisely analogous position to the corporate partners in *Taber Partners*. The D.C. Circuit has also adopted this position.[12]

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[12] *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam) ("[f]or diversity purposes, the citizenship of a limited partnership does not depend upon the state of its organization, the location of its principal place of business, or any of its other features as an entity").

The First, Second, and D.C. Circuits, therefore, have squarely rejected the significance of any supposed "very close nexus" to a state in determining the citizenship of an entity such as a limited partnership, and all three circuits have done so in the context of determining a property developer's citizenship. The Fourth Circuit's contrary determination unacceptably deviates from both this Court's precedent and the practice of other courts of appeals, and should be rejected.

C. Correcting The Fourth Circuit's Flawed Methodology Is Important To Companies And Partnerships That Operate On A Regional And Nationwide Basis

The question presented by this case is of the utmost importance to the many national and multinational businesses in this country that operate through various subsidiaries, partnerships, or limited partnerships. Under the Fourth Circuit's logic, an unsuccessful plaintiff in federal court has every incentive to scour corporate and partnership records to point to some related, alternative entity that he or she could have sued – but did not actually sue. Indeed, the Fourth Circuit goes so far as to hold that "the citizenship of the nominal parties listed on the Complaint," *i.e.*, the entities that were actually sued, "is in no way dispositive of a subject matter jurisdiction challenge." Pet. App. 17a. Instead, the court of appeals holds that a removing defendant "ha[s] the burden" of placing into the record "sufficient indicia – by a preponderance of the evidence – that one member" of the "group of companies doing business in Virginia is not a citizen of the Commonwealth." *Id.* Moreover, the Fourth Circuit demands that removing defendants provide "evidence as to how" entities legally separate from the named defendant and that were not sued "are distinct or uninvolved in" the named defendant's "business enterprises" and "property holdings" in the Commonwealth of Virginia. *Id.* at 11a. That heavy burden would effectively slam shut the doors of the federal courts to companies, like property develop-

ment and management companies, that do business in multiple states or that partner with local entities to carry out individual projects.

The Fourth Circuit's opinion also rewards sandbagging by permitting a search for jurisdictional spoilers not named in the complaint itself and by placing the heavy burden of proving that such putative defendants are diverse through the presentation of factual material to the court of appeals in the first instance. It thereby gives plaintiffs in the tens of thousands of diversity cases filed in the federal courts each year a second bite at the apple in state court whenever they lose on the merits, so long as they can conjure up an alternative defendant that a court of appeals might be persuaded to accept. The Fourth Circuit's decision here to overturn a final judgment on the merits and force the parties to relitigate the case in state court is a particularly pernicious application of its wayward jurisdictional precepts. Permitting such litigation gamesmanship undercuts important principles of finality, deprives litigants of their right to a federal forum, and threatens to strip district courts of their important role in deciding disputes between citizens of different states.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 24, 2004

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees,

AND

INVESCO INSTITUTIONAL,
Defendant.

[Decided June 30, 2004]

Before WIDENER and GREGORY, Circuit Judges, and C. ARLEN BEAM, Senior Circuit Judge of the United States Court of [Appeals for the Eighth Circuit].

GREGORY, Circuit Judge:

Plaintiffs discovered evidence of toxic mold in their Fairfax County, Virginia apartment. They notified the property management office in Virginia and an inspection was ordered, mold was found, and abatement was required. During the mold remediation process Plaintiffs were relocated and their personal belongings were left in the care of the property management firm and the mold treatment firm. After treatment had been completed, Plaintiffs determined that certain of their valuables had been misplaced or stolen. They also learned from their treating physician that the mold had caused and exacerbated certain medical conditions. Plaintiffs brought suit in state court alleging breach of implied warranty of

habitability, negligence, conversion and violations of Virginia's landlord-tenant act. Defendants removed the matter to federal court relying on diversity of citizenship. In support of removal, Defendants contended that the Texas parent corporation named in the state complaint created diversity of citizenship. Plaintiffs contended that there was not complete diversity because the property was managed by a Virginia subsidiary of the Texas parent. The district court denied Plaintiff's motion to remand for lack of diversity jurisdiction and granted summary judgment for the defendants. Plaintiffs now appeal the jurisdictional issues and summary judgment. We conclude that Defendants failed to carry their burden of proof with respect to their allegedly diverse citizenship. The judgment of the district court is therefore reversed as to jurisdiction, the remainder is vacated, and this case is remanded with instructions to remand to state court pursuant to 28 U.S.C. § 1447(c).

I.

On August 22, 2002, Plaintiffs Christopher and Juanita Roche (the "Roches" or "Plaintiffs") filed a Motion for Judgment against Lincoln Property Company ("Lincoln"), the State of Wisconsin Investment Board ("SWIB"), and Invesco Institutional ("Invesco") in the Virginia Circuit Court for Fairfax County, claiming personal injury and property damage sustained as a result of their exposure to toxic molds at the Westfield apartments. The Motion for Judgment named as defendants: "Lincoln Property Company t/a Lincoln Property Company ECW, Inc.," "INVESCO Institutional (N/A Inc.) Institutional Division of AMVESCAP a/k/a Invesco Realty Advisors," and "SWIB Investment Company State of Wisconsin Investment Board Lincoln Property Company." On September 17, 2003, Defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1441, on the basis of diversity of citizenship. Defendants then filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which was granted with leave for Plaintiffs to file an amended

complaint. Plaintiffs amended their complaint and a jury trial was scheduled for May 3, 2002.

On April 22, 2003, Plaintiffs filed a Motion to Remand challenging diversity with respect to Lincoln. The motion was later expanded to include an additional claim of lack of subject matter jurisdiction on the basis that defendant SWIB was an arm of the State of Wisconsin and, therefore, not a citizen for diversity purposes. On May 2, 2003, the Plaintiffs filed a Rule 60(b) motion for relief from an order or judgment that is void for lack of jurisdiction.

On July 11, 2003, the district court denied Plaintiffs' motions to remand and for relief. On August 21, 2003, Plaintiffs filed their Notice of Appeal. On September 3, 2003, the district court denied Plaintiffs' motion for reconsideration.

II.

We review a denial of a motion to remand to state court *de novo*. *See Mayes v. Rapoport*, 198 F.3d 457, 460 (4th Cir.1999) (citing *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 384, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir.1994) (reviewing *de novo* denial of motion to dismiss for lack of subject matter jurisdiction); *see also Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir.1995) (reviewing *de novo* denial of motion to remand)).

Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 U.S.C. § 1332(a)(1) and U.S. Const., Art. III, § 2. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).[1] Early in its history, the Supreme Court

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[1] In *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806), the Supreme Court concluded that the precursor to 28 U.S.C. § 1332(a)(1) required that "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts." *Id.* As the Supreme Court later noted, however, the requirement of complete diversity is derived from "the words of the act of Congress," and not the Constitution. *State Farm Fire & Cas. Co. v.*

"established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be **real and substantial parties** to the controversy." *Id.* at 460-61, 100 S.Ct. 1779 (quotations and citations omitted) (emphasis added). "Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of **real parties to the controversy**." *Id.* (citations omitted) (emphasis added).

The early cases held that only "persons" could be real parties to the controversy. Artificial or "invisible" legal creatures were not citizens of any State. *Id.* (citing *Bank of United States v. Deveaux*, 5 Cranch 61, 86-87, 91, 3 L. Ed. 38 (1809)).[2] Corporations suing in diversity, however,

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Tashire, 386 U.S. 523, 531, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967). Article III of the Constitution requires only minimal diversity. *Id.*; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 n. 18, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). However, it is axiomatic that the jurisdiction of the inferior courts – meaning the court of appeals and the district court – is determined by Congress. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 67, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality opinion) (Brennan, J.); *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1855); *see also Yang v. INS*, 109 F.3d 1185, 1197 (7th Cir.1997) (Easterbrook, J.) ("The power to establish the inferior federal courts under Article III § 1 permits Congress to determine their jurisdiction."). Thus, we must exercise our jurisdiction in a manner that is strictly consistent with the plain language of the removal statute and congressional intent.

[2] The *Navarro* Court noted:

> Although overruled in *Louisville, C., & C.R. Co. v. Letson*, 2 How. 497, 2 How. 497, 43 U.S. 497, 11 L.Ed. 353 (1844), *Deveaux* was resurrected by *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 14 L.Ed. 953 (1854). *Marshall* held that an artificial entity cannot be a citizen, but that the persons who "act under [corporate] faculties . . . and use [the] corporate name" are presumed to reside in the State of incorporation. *Id.*, at 328; *see St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562, 16 S.Ct. 621, 40 L.Ed. 802 (1896). This view endured until 1958, when Congress amended the diversity statute to provide explicitly that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Act of July 25, 1958, § 2, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)).

Navarro, 446 U.S. at 461 n. 7, 100 S.Ct. 1779.

have long been "deemed" citizens in modern jurisprudence. *See id.*[3] The "real and substantial party in interest standard," however, applies nonetheless. *Id.* Nearly all federal circuit courts have applied the "real party in interest standard" when determining whether true diversity of citizenship exists. *See e.g., Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752-53 (5th Cir.1996) (applying real party in interest standard on review of motion to remand for lack of diversity); *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Group*, 823 F.2d 302 (9th Cir.1987) (same), *overruled on other grounds by Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991); *Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543-44 (6th Cir.1984) (same); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir.1981) (same and noting that real party in interest is to be determined by "essential nature and effect of the proceeding").

Moreover, this Court has also applied the "real and substantial party in interest" standard when determining the propriety of exercising diversity jurisdiction. *See, e.g., Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir.1998) (citing *Navarro*, 446 U.S. at 460-61, 100 S.Ct. 1779 *and Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (observing that the corporation, not the shareholder, is the real party in interest in a shareholder's derivative suit)); *see also* authorities cited in note 4, *infra*, (applying real party in interest standard to determine whether assignments were collusive to obtain or destroy diversity jurisdiction). And, it is firmly settled that a corporate parent and its subsidiaries may not manipulate federal diversity jurisdiction by litigating cases in the name of the other where the real party in interest is not diverse. *See Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174 (9th Cir.1979) ("We acknowledge that assignments of Causes of action

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[3] Under 28 U.S.C. § 1332(c) a corporation is deemed a citizen of its state of incorporation and of the state where it has its principal place of business.

between parents and subsidiaries are presumptively ineffective to create diversity jurisdiction.") (citing *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 475 (2d Cir.1976) *and Green & White Constr. Co. v. Cormat Constr. Co.*, 361 F.Supp. 125, 127-28 (N.D.Ill.1973)).[4]

Thus, in diversity cases, the general rule is that the citizenship of the real parties in interest is determinative for purposes of diversity jurisdiction. The citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism. It is based upon the principle that a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts. *See* C. Wright & A. Miller, 6A Federal Practice & Procedure Civ.2d § 1556, at 419-22 (West 2004). Diversity of citizenship, therefore, is determined not by reference to the formal or nominal parties but, rather, there must be complete diversity between the real and substantial parties in interest. *See* 28 U.S.C. § 1332(a); *see also Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 (5th Cir.1990) (observing that removal jurisdiction is

[4] *See also, e.g., Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 642, 646 (1st Cir.1995) (merger of corporation into another corporate shell ineffective to create diversity jurisdiction); *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 859, 861-62 (2d Cir.1995) (twenty-nine air carriers "real and substantial parties" because collection agency was "mere conduit for a remedy owing to others"); *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991, 993 (9th Cir.1994) (assignment by wholly-owned corporate subsidiary of its rights to parent corporation ineffective to create diversity jurisdiction); *Yokeno v. Mafnas*, 973 F.2d 803, 809-11 (9th Cir.1992) (for real party in interest determination, assignment between corporation and director presumptively collusive and on remand could only be overcome with proof of legitimate business reason and consideration of several other factors); *J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 331 F.Supp. 1215, 1220, 1222 (W.D.Mo.1971) (whether assignment by wholly owned corporate subsidiary, who was real party in interest, of its rights to parent corporation was collusive presented "very close question of fact and law"; claim dismissed on *forum non conveniens* ground), *aff'd*, 462 F.2d 998 (8th Cir.1972).

"based on the citizenship of the real parties in interest rather than their appointed representatives" or nominal parties). *But cf. Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 252 (5th Cir.1973) ("The citizenship of one who has an interest in the lawsuit but who has not been made a party to the lawsuit by plaintiff cannot be used by plaintiff on a motion to remand to defeat diversity jurisdiction.").[5]

III.

Congress has resolved that, "[i]f at any time before final judgment it appears that the district court lacked subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). And, it is well-settled that courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); *Dixon v. Coburg Dairy*, 369 F.3d 811 (4th Cir.2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, '[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (citations omitted). Likewise, it is equally well-settled that the parties' characterization

[5] The Court of Appeals for the Fifth Circuit relied upon *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968) and *Saint Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Both of those cases dealt with the joinder (or failure to join) an insurance company who had, at best, a tangential interest in the pending claim. Applying Fed.R.Civ.P. 19, the Supreme Court concluded in *Provident* that the citizenship of the insurer was not to be considered for diversity purposes because, under Rule 19, it was not a necessary and indispensable party – the insurer was only obligated to pay the claim up to policy limits and its absence did not affect the substantial rights of the parties. In this case, however, the Roches contend that Lincoln's Virginia entity is the real and substantial party in interest, without whom they cannot be made whole. And, Lincoln has been made a party to the lawsuit.

of themselves or their claims is not determinative for federal jurisdiction purposes. *Id.* at 140.[6]

The Roches moved for remand arguing that the district court lacked subject matter jurisdiction insofar as Defendant Lincoln is not a Texas corporation, but rather is not a corporation at all and, instead, is a partnership with a partner who is a Virginia resident. J.A. at 1973.[7] According to the district court, the Roches based their motion for remand on the following uncontroverted[8] evidence:

> (1) the deposition of Fred E. Chaney, Lincoln's Rule 30(b)(6) designee, who allegedly stated that **Lincoln was a partnership and not a company**;
>
> (2) the deposition of John LeBeau, vice president of the Mid-Atlantic Regional Division of Lincoln, who identified **Jeff Franzen as a Senior Vice President, and "partner," in Lincoln Property Company**;
>
> (3) Lincoln's corporate website identifying **Jeff Fransen as a "partner"**;
>
> (4) certificates from the Virginia State Corporation Commission certifying that Lincoln Property Company is neither authorized nor registered to conduct business in Virginia, and certifying that **EQR/Lincoln Limited Partnership is an authorized and registered "partnership" in Virginia**; and

[6] As the *Sheets* Court noted, "decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions." 313 U.S. at 140, 61 S.Ct. 888 (citing *Mason City & Ft. Dodge Ry. Co. v. Boynton*, 204 U.S. 570, 27 S.Ct. 321, 51 L.Ed. 629 (1907)). And, as the Supreme Court noted in *Carden v. Arkoma Assocs.*, "the nature of the named party does not settle the question of who are the real parties to the controversy" for jurisdictional purposes. 494 U.S. 185, 204, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) (citing *Navarro*, 446 U.S. at 464-66, 100 S.Ct. 1779).

[7] Plaintiffs also contended that Lincoln misrepresented its state of citizenship in the Notice of Removal.

[8] Other than the district court's own analysis, the court cited no contrary evidence offered by Defendants.

> (5) the Fairfax County Tax Assessment Office records demonstrating that **Jeff Franzen is a resident of Fairfax County, Virginia**.

J.A. at 1974 (emphasis added).

If diversity jurisdiction is challenged, the burden of proof remains on the party invoking federal court jurisdiction, and the citizenship of each real party in interest must be established by a preponderance of the evidence. *Mas v. Perry*, 489 F.2d 1396 (5th Cir.1974); *Janzen v. Goos*, 302 F.2d 421 (8th Cir.1962). If this burden is not met, the federal court must dismiss the action. *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890 (4th Cir. 1972); *see also* Fed.R.Civ.P. 12(h)(3). A party's mere allegation of diversity cannot satisfy its burden of establishing the district court's jurisdiction. "In a properly pleaded diversity action between corporations the plaintiff will not only allege that there is diversity of citizenship, but will also advert to the factors set out by § 1332(c) that establish corporate citizenship." (*District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043-44 (D.C.Cir.1986)). The court must then examine those factors and the facts in the record and determine whether diversity exists.[9] When jurisdiction is challenged, courts generally do not accept the *carte blanche* naked allegations of diverse citizenship or bald assertions of jurisdictional facts. *See, e.g., Coburg*, 369

[9] "To determine whether a party has adequately presented facts sufficient to establish federal diversity jurisdiction, appellate courts must look to the face of the complaint, ignoring mere conclusory allegations of jurisdiction." *Penteco Corp. Ltd. P'ship–1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir.1991) (citations omitted). Because federal courts are courts of limited jurisdiction, there is a presumption against its existence, and the party invoking federal jurisdiction bears the burden of proof when diversity is challenged. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974); *see also Whitelock v. Leatherman*, 460 F.2d 507, 514-15 (10th Cir.1972) (allegations of mere residence may not be equated with citizenship for the purposes of establishing diversity and where the pleadings are found wanting, an appellate court may review the record for evidence that diversity exists).

F.3d 811, (requiring Plaintiff to state a substantial federal claim and declining to base jurisdiction upon an allegation that his employer violated "his constitutional rights"); *Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 145 F.3d 660, (4th Cir.1998) (declining to accept conclusory allegations of residence as prima facie proof of citizenship for diversity purposes and collecting cases on similar points); *cf. Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1029 (6th Cir.1968) ("Jurisdiction is not conferred on a federal court in a non-diversity case by mere conclusory allegations that one's constitutional or civil rights have been violated."); *Powder Power Tool Corp. v. Powder Actuated Tool Co.*, 230 F.2d 409, 414 (7th Cir.1956) ("The rule is firmly settled that the mere allegation of the jurisdictional amount when challenged as it was here is not sufficient and that the burden is upon the plaintiff to substantiate its allegation." (citation omitted)). Indeed, "[w]here the pleadings are found wanting, an appellate court may also review the record for evidence that diversity does exist." *Penteco*, 929 F.2d at 1521 (citing *Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 382, 24 S.Ct. 696, 48 L.Ed. 1027 (1904)); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *F & S Constr. Co. v. Jensen*, 337 F.2d 160 (10th Cir.1964); *Buell v. Sears, Roebuck & Co.*, 321 F.2d 468 (10th Cir.1963).

The district court, however, denied the Roches' motion for remand, concluding that Lincoln Property Company was a citizen of Texas based upon its incorporation and principal place of business there. J.A. at 1974. The court also concluded that "Lincoln Property Company is not a citizen of Virginia since the company is not registered to conduct business in Virginia." *Id.* The court did not determine the citizenship of the real parties in interest. The court did recognize, however, that "Lincoln operates under many different structures and that [Jeff Franzen, a Virginia citizen,] is a **partner** in new deals." *Id.* (emphasis added). And, while acknowledging that Lincoln's "corporate website" designates Jeff Franzen as a "partner" but

"does not specify the partnership to whom Mr. Franzen belongs," the court concluded that "this evidence fails to demonstrate that Mr. Franzen was a partner in either Defendant Lincoln or its subsidiary EQR." J.A. at 1975. The burden of demonstrating diversity, however, is not on the Roches; the burden is on Lincoln. *Burden*, 60 F.3d at 216. Thus, the district court erred by weighing the evidence in favor of Lincoln.

By its own admission, Lincoln operates under many different structures and Jeff Franzen and Fred E. Chaney are both "partner[s]" of some Lincoln entity related to this action. J.A. at 1601, 1605-06. Indeed, Lincoln's 30(b)(6) deponent, in his deposition as spokesperson for Lincoln, indicated that "we're a partnership" with "multiple structures that we operate under." And, Jeff Franzen is a Lincoln "partner" and a resident of Virginia.[10] Only after Lincoln's 30(b)(6) deponent testified that Franzen was a "Senior Vice President/Partner" did Franzen file a self-serving affidavit contending that he is "referred to as a 'Partner' because [he is] a partner in several Texas limited partnerships that are involved in the acquisition and development of properties." J.A. at 1608. Curiously, he never identifies those other limited partnerships, nor is there any evidence as to how they are distinct or uninvolved in Lincoln's Virginia business enterprises and many Virginia property holdings, nor does Franzen identify any of his partners.

Nonetheless, at oral argument and in its briefs, Lincoln admitted that "the entity that receives the management

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[10] John LeBeau, who is an executive officer of Lincoln, testified that Jeff Franzen is the "highest ranking officer" in Lincoln's Herndon Virginia regional office and that he is "Senior Vice President, **partner**." J.A. at 1606 (emphasis added). When pressed farther, LeBeau could not (or would not) identify precisely the entity of which Jeff Franzen was a "partner." Indeed when asked whether "[h]e is a partner in Lincoln Property Company," LeBeau responded, "I don't know what he is a partner of." *Id.* In light of Lincoln's burden of establishing diversity, this ambiguity – created by Lincoln – surely cannot be resolved in favor of finding diversity.

fees for Westfield Village Apartments" is "EQR/Lincoln Limited Partnership." J.A. at 1531. Lincoln also concedes that the citizenship of a limited partnership is determined by reference to **all** of its partners. *See* J.A. at 1556 (citing *Carden*, 494 U.S. at 192-93, 110 S.Ct. 1015). But, Lincoln fails to carry its burden of demonstrating that each of its partners are not Virginia citizens. In its casual attempt to demonstrate diversity, Lincoln discloses the names of only two "general partners" in EQR/Lincoln Limited Partnership: (1) Lincoln Management Corporation, a Texas Corporation with its principal place of business in Dallas, Texas; and (2) Lincoln Placeholder Limited Partnership, which is allegedly "a Texas partnership." *See, e.g.*, J.A. at 1562, 1574.

Nowhere in its brief, its declarations of its general counsel, nor in the various foreign state corporation records appended to the record, has Lincoln disclosed the identity of any of its **limited partners**. Indeed, the Certificate of Limited Partnership certified by the Delaware Secretary of State discloses only the name of EQR/Lincoln Limited Partnership's "general partners," to wit: Lincoln Eastern Management Corporation and Lincoln Placeholder Limited Partnership. J.A. at 1574. As, Lincoln no doubt concedes, however, the citizenship of a limited partnership is determined by the citizenship of **all** of its partners, **both limited and general**. J.A. at 1556 (D.C.Op.) (citing *Carden*, 494 U.S. at 192-93, 110 S.Ct. 1015). And, a limited partnership has, at minimum, one or more general partners **and one or more limited partners**. *See, e.g., Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302, 306 n. 6 (5th Cir.1991) (discussing modern partnership codes and citing Tex.Rev.Civ. Stat. Ann. art. 6132a-1 (limited partnerships have one or more general partner and one or more limited partner)); 6 Del. Cd. § 17- 101(9) (defining a "limited partnership" as "a partnership formed by 2 or more persons under the laws of the State of Delaware and having 1 or more general partners and 1 or more limited partners"). The partnership filings in the record, however, do not disclose the

identity or citizenship of **any** of EQR/Lincoln Limited Partnership's limited partners.[11] Thus, we can not know whether any of them is a Virginia citizen.

Ultimately, therefore, given the affirmative evidence in the record (that Jeff Franzen, a Virginian, is a Lincoln "partner" and that Lincoln has a "partnership" that is "authorized and registered in Virginia"), and the lack of sufficient evidence to the contrary, we cannot say that Lincoln has met its burden of establishing diversity.[12]

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[11] Lincoln's business structure is quite confusing, and nowhere in the record documents pertaining to this issue did we find the names of the limited partners in any of these limited partnerships. For example, the original certificate of limited partnership for EQR/Lincoln Limited Partnership was filed November 13, 1997, designating both Lincoln Eastern Management Corp. and Lincoln Placeholder Limited Partnership as "general partner[s]." J.A. 1573-74. No limited partners were disclosed. That certificate was later corrected on November 19, 1997, only to state that "the sole General Partner is Lincoln Eastern Management Corporation, a Texas corporation. . . ." J.A. at 1575. The Limited Partnership Agreement, effective November 13, 1997, however, designates Lincoln Eastern Management Corporation as both general and limited partner of EQR/Lincoln Limited Partnership. J.A. 1576-77. However, a limited partner generally may not be a general partner. *See, e.g., Unger v. C.I.R.*, 936 F.2d 1316, 1318 (D.C.Cir.1991) (noting that general partners are managers of partnership and that "a limited partner may not participate in the active management of the enterprise"); *Magneson v. C.I.R.*, 753 F.2d 1490, 1498 (9th Cir.1985) ("limited partner may not actively participate in running the business" as a general partner). And, Lincoln Placeholder Limited Partnership's general partner is Lincoln Eastern Management Corporation and its limited partner is Lincoln E.C.W. Property Management, Inc. J.A. at 1591.

[12] Another reason jurisdiction may be lacking stems from the Roches' conversion claim. In their original state complaint, Supp. J.A. at 63, and in their amended federal complaints, J.A. at 198-199, the Roches contend that their personal property was "dispossess[ed,]" without their consent, "destroy[ed]," "wrongfully withheld," "converted," and "lost or stolen." Thus, the Roches contend, as was made clear at oral argument, that Lincoln and Barco (the Virginia environmental company hired by Lincoln to perform mold remediation) were "bailees" of their property. In its defense, Lincoln contended at oral argument that Barco, not Lincoln, was the bailee and that, under a bailment theory, Lincoln could not be liable for conversion of the Roches' property because their property was bailed only to Barco.

Indeed, the further we look the more dubious the diversity of citizenship inquiry becomes. In this case, the citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises; but mostly, Lincoln's failure to disclose all of the necessary jurisdictional facts. The negative inferences resulting from these obscurities, however, must be borne by Lincoln, who created them, not the Roches and not the federal courts.[13]

IV.

The present controversy is a classic landlord-tenant dispute, which most often is litigated in state court and is far less often the proper subject of federal jurisdiction.

Indeed, it was Lincoln's position that SWIB and Barco are the real parties in interest with respect to the conversion claim. And, as Wright and Miller have noted: "As a result of looking at the citizenship of the real party in interest and because of express reference to them in the second sentence of Rule 17(a) [requiring cases to be litigated in name of real parties in interest, including executors, administrators, bailees, *etc.*], federal courts have held that the citizenship of an executor, administrator, guardian, bailee, or trustee is determinative in measuring the court's jurisdiction." Wright & Miller, 6A Fed. Pract. & P. Civ.2d § 1556 at 422-23 (emphasis added) (citing, with regard to bailees, *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (8th Cir.1951)); *see also Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273, 1287 (9th Cir.1979) (finding no jurisdiction under any basis because Rule 17(a) requires cases to be litigated in name of real party in interest, who was not joined or did not consent to litigation); *cf. Certain Interested Under-writers at Lloyd's, London*, 26 F.3d 39, 43 n. 1 (6th Cir.1994) (noting that Supreme Court observed in *Navarro*, *supra*, that "Rule 17(a) frequently overlaps with the jurisdictional rule that diversity jurisdiction depends on the citizenship of the real parties to the controversy, but 'the two rules serve different purposes and need not produce identical outcomes in all cases.'" (citation omitted)). We shall nonetheless defer further consideration of this concern, seeing that the more crucial dispute concerns the citizenship of Lincoln and its relevant enterprises.

[13] An additional reason for employing the real party in interest test when construing the diversity statute is, aside from federalism, is "to avoid burdening the federal court system with cases that do not present a federal question or a threat of prejudice. . . ." Wright & Miller, 6A Fed. Pract. & P. § 1556 at 422.

Indeed, we have been reluctant to get involved in local disputes over land and property. *Cf. Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir.1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of federal courts. . . . Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes."). There is ample record evidence that the property at issue is located in Virginia, the mold abatement services contracted for were performed in Virginia by a Virginia company, Lincoln maintains several rental properties in Virginia other than the one at issue here, Lincoln has a regional office in Virginia,[14] and all of the correspondence and communication related to this controversy occurred in Virginia. *See* J.A. at 669-691. Moreover, Lincoln's Texas office is rarely, if at all, referenced in the record. *See, e.g., id.* All of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably, EQR/Lincoln Limited Partnership, which "is an authorized and registered partnership *in Virginia*." J.A. at 1974 (emphasis added).

The obvious and elementary policy behind diversity jurisdiction is that an out-of-state defendant should be entitled to a federal forum if he decides that he cannot receive a fair trial in a state court due to local prejudice. *Asher v. Pacific Power & Light Co.*, 249 F.Supp. 671, 674 (N.D. Cal.1965). As the Court of Appeals for the Third Circuit recognized in *Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494 (3d Cir.1997), the purpose of diversity jurisdiction is to provide a tribunal free from

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[14] Most of the communications between the Roches and Lincoln were directed to and received by Lincoln Property Company at "115 Herndon Parkway, Suite 100 Herndon, VA 20170" and responses from Lincoln were sent from "Westfield Village Apts. 5115 Woodmere Dr. # 103, Centreville, VA 20120." J.A. at 670-686.

local prejudice. *See id.* at 499. Thus, the *Dresser* Court reasoned:

> If diversity jurisdiction exists because of a fear that the state tribunal would be prejudiced towards the out-of-state plaintiff or defendant, that concern is understandably allayed when that party is joined with a citizen from the forum state. Indeed, when members from the forum state are present on both sides of the controversy, it becomes more difficult to imagine that a state tribunal would favor one side based upon biases in favor of its own citizens.

Id. at 499 (citations omitted).

In this case, the concerns upon which diversity jurisdiction are founded are easily allayed. Even though the nominal party and ultimate parent company, Lincoln Property Company, is a Texas citizen, it is certainly not an alien to Virginia. From the record, it appears that the real and substantial party in interest is the Virginia subsidiary, be it a partnership, corporation or otherwise, rather than the Texas parent. Moreover, the real party in interest owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record.[15] Thus, to be accurate, both the Texas parent and the Virginia sub-"partnership" should be parties to the instant action.[16] Whether both are joined, or the action is maintained against the Virginia real party(ies) in interest, complete diversity would not exist and the case should be

[15] We also note that, although the Roches sued the Texas parent company, they effected service of process upon Lincoln's registered agent in Virginia.

[16] Given the manner in which Lincoln conducts business (using many different structures) and the confusion which is created thereby, it is not surprising that Plaintiffs named the parent company *ab initio* rather than engaging in a confounding wild goose chase – it has even confused this Court – to determine the real party in interest.

remanded. *See* 28 U.S.C. § 1447(e).[17] In any event, the citizenship of the nominal parties listed on the Complaint is in no way dispositive of a subject matter jurisdiction challenge. Because the parties may not waive or consent to federal subject matter jurisdiction – indeed we must raise it *sua sponte* if jurisdiction appears questionable – the nominal parties cannot provide a valid basis for finding jurisdiction. *See State v. Ivory*, 906 F.2d 999, 1001 n. 2 (4th Cir.1990) (noting that subject matter jurisdiction may not be waived and we have authority to raise the matter, even *sua sponte*).

Neither in the removal petition nor in the record is there sufficient indicia – by a preponderance of the evidence – that one member of the Lincoln group of companies doing business in Virginia is not a citizen of the Commonwealth. Seeking removal, Lincoln had the burden of establishing diversity. *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir.1986). As the burden has not been met, federal jurisdiction does not exist. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); *see also Ivory*, 906 F.2d at 1001 (noting that "we may properly consider on appeal whether jurisdiction exist[ed] at the time of judgment" and concluding it did not exist) (internal quotation marks omitted) (citing *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972); *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Group*, 823 F.2d 302, 304 (9th Cir.1987)) (burden on party seeking federal jurisdiction to establish

[17] 28 U.S.C. § 1447(e) provides the district court with two options: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Since joinder of the "real party in interest" would be required under Rule 17(a), the district court's options would likely be limited to remand; the court does retain some discretion, though. We have held that: "These are the only two options for a district court faced with a post-removal attempt to join a nondiverse defendant; the statute does not allow a district court to retain jurisdiction once it permits a nondiverse defendant to be joined in the case." *Mayes v. Rapoport*, 198 F.3d 457, 462 (4th Cir.1999).

diversity of real parties in interest); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.1966) (addressing subject matter jurisdiction, even though defendant did not seek leave to appeal district court's denial of its motion to dismiss on the ground that plaintiff and limited partner of defendant general partnership were not diverse).

V.

At the end of the day, the burden of establishing diversity remained upon Lincoln. And, Lincoln failed to carry its burden. Thus, we are left only to conclude that our lack of confidence in the allegedly diverse citizenship of Lincoln's real party in interest precludes our jurisdiction. 28 U.S.C. § 1331(a). If this were a different case, where Defendants merely inadvertently failed to present evidence of diversity, we might be sympathetic and consider remanding this case back to the district court for further proceedings so as to allow Defendants an opportunity to cure their inadvertence. *See, e.g., Clephas v. Fagelson, Shonberger, Payne & Arthur*, 719 F.2d 92, 94 (4th Cir.1983) (noting that "it was a mere inadvertence that led the plaintiff to omit allegation and proof" of diversity and that "provided that we were persuaded that the plaintiff's case had merit, would view sympathetically a motion to enter an order remanding this case to the district court to permit the plaintiff belatedly to allege and prove such diversity of citizenship"). The issue of diversity jurisdiction, however, was extensively litigated below. Thus, this case is not one of inadvertence and we, therefore, would not be sympathetic to a motion of the kind discussed in *Clephas*, *supra*.

Consequently, the present record is insufficient to sustain the jurisdiction of the court below or the jurisdiction of this court except for the application of jurisdictional limitations. Finding that we lack subject matter jurisdiction, we can not address the merits of the case. Rather, we reverse the judgment of the district court on the issue of subject matter jurisdiction, we vacate the remainder of the court's judgment, and we remand the case back to the

district court with instructions to remand the case to the Virginia Circuit Court for Fairfax County.

REVERSED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[Filed Apr. 16, 2003]

ORDER

THIS MATTER is before the Court on Defendants', Lincoln Property Company ("Lincoln") and the State of Wisconsin Investment Board ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D., and for summary judgment on all claims; and, on Plaintiffs', Christophe and Juanita Roche, motion for summary judgment. For the reasons to be stated in a forthcoming Memorandum Order, Defendants' Motion to bar the testimony by Richard Bernstein, M.D., is GRANTED. Furthermore, Defendants' Motion for Summary Judgment as to all of Plaintiffs' claims is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

The Court DIRECTS the Clerk to remove this case from the trial docket, and the parties are instructed to stop their trial preparation.

The statute of limitations for appeal of this decision is tolled until the Court enters its forthcoming Memorandum Order and Judgment. This Order does not constitute

a "judgment" as defined in Federal Rule of Civil Procedure 54(a).

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of April, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
04/16/03

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

MEMORANDUM ORDER

THIS MATTER is before the Court on the Plaintiffs' and the Defendants' motions for summary judgment on all claims. This case concerns alleged personal injuries and property damage suffered by the Roches as a consequence of exposure to toxic molds at an apartment at Westfield Village Apartments, a complex owned by the State of Wisconsin Investment Board ("SWIB") and managed by Lincoln Property Company ("Lincoln"). The issue before the Court is whether there exists a genuine issue of material fact concerning the handling of the Plaintiffs' complaints about the mold and leaks in their apartment, the remediation of the Plaintiffs' apartment, and the storage of the Plaintiffs' personal property by Lincoln and SWIB which precludes granting summary judgment in favor of the Defendants on Plaintiffs' claims of negligence per se, common law negligence, breach of the implied warranty of habitability, conversion, and punitive damages. The Court finds that there are no genuine issues of material fact in dispute and holds that Defendants are entitled

to judgment as a matter of law on all of the counts of the Second Amended Complaint. Plaintiffs fail to present a claim for either negligence per se or ordinary negligence because they fail to establish that the Defendants owed Plaintiffs a duty, proximate causation, and damages. Defendants are entitled to summary judgment on the implied warranty of habitability claim because the law of the case has established that there is no implied warranty of habitability between a landlord and a tenant. Plaintiffs fail to establish a claim for conversion because they are unable to show either how the Defendants have exercised rights over their chattels to their exclusion or how the mold in the apartment had deprived them of their right to the chattel. Defendants are entitled to summary judgment on Plaintiffs' claim for punitive damages because the Court had previously ruled that the Plaintiffs' initial Motion for Judgment had failed to set out sufficient facts to support a claim for punitive damages and Plaintiffs' Second Amended Complaint does not cure these deficiencies. Furthermore, the Court denies Plaintiffs' motion for summary judgment because the motion is procedurally deficient because it fails to comply with the mandates of Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7(E) and 56(B).

I. BACKGROUND

Christophe and Juanita Roche and their children lived in an apartment at Westfield Village from April 2001 to March 2002. The Roches claim that their apartment was poorly maintained, that there were water leaks, holes in the wall, and mold growing within the apartment. The Roches contend that, as a result of being exposed to toxic levels of mold, they currently suffer respiratory and other ailments.

Plaintiffs leased their apartment from SWIB on March 30, 2001. Lincoln managed the Westfield Village Apartments in Centreville, Virginia. Plaintiffs complained to Lincoln about the poor condition of their apartment,

verbally on several occasions and complained in writing on three occasions. Plaintiffs complained of water leaks needing repair, of holes that had been cut in the wall, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) The Defendants responded to the written requests within 24 hours and sent maintenance personnel and outside contractors to Plaintiffs' apartment to assess the service calls and to perform repairs. On January 16, 2002, the Plaintiffs sent a letter to Lincoln complaining about the status of the repairs to their apartment and the appearance of mold throughout their apartment. On March 8, 2002, Plaintiffs notified Lincoln that they had retained Ronald G. Ginste of Potomac Environmental Testing Services ("PETS"), to conduct testing for the presence of mold in the apartment. PETS found several types of mold present in the apartment; specifically Stachybotrys, Cladosporium, Penicillium, Aspergillus, Smuts, Hyphal elements and epicoccum. PETS also suggested that the Plaintiffs vacate the apartment for their own safety. Lincoln placed the Plaintiffs in a hotel and subsequently into another unit at the Village of Potomac Falls.

Lincoln retained BARCO Enterprises, Inc., ("BARCO") to remediate Plaintiffs' personal property. Plaintiffs requested that any remediation attempt would have to result in the personal property being free of the three toxic microbes found in the apartment. On March 23, 2002, Plaintiffs sent a letter to BARCO and Lincoln consenting to the removal of their personal property for remediation purposes. In April 2002, BARCO inventoried, separated the personalty into decontamination and disposal categories, wrapped and removed all of the items of personal property in Plaintiffs' apartment. BARCO provided the Plaintiffs with an inventory of the property in storage. Plaintiffs assert that the inventory is incomplete and lacks several of Plaintiffs' most valuable possessions. After several communications between the Plaintiffs and Invesco's counsel (Invesco is no longer a party to this

case), Invesco sent a follow-up letter to Plaintiffs' counsel informing him that Plaintiffs had not advised Invesco concerning the disposition of the property, which was in sealed storage containers at BARCO's facility. In his response, Plaintiffs' counsel stated that "action taken to harm or destroy any of the property would be considered a conversion and an intentional act for which we will seek redress" and demanded that Invesco reimburse Plaintiffs the value of the personalty – $160,000.00. Plaintiffs' personal property remains in storage at BARCO in the same condition as when it was removed from Plaintiffs' apartment.

Subsequent to leaving the apartment in March 2002 and after having filed this action, Plaintiffs sought treatment from Richard Bernstein, M.D., an allergist. Mr. Roche complained of memory loss, chronic headaches, sinus problems, mild hypersensitivity to smells and chronic nasal stuffiness. (Defs.' Mem. Supp. Mot. to Exclude Richard A. Bernstein, Ex. D. at 2.) Mrs. Roche complained of memory loss, chronic upper respiratory sinus symptoms, some chest congestion and shortness of breath. (*Id.* at 4.)

Defendants filed a motion to exclude Dr. Bernstein's testimony as to specific causation for both Plaintiffs' personal injuries based on Dr. Bernstein's failure to adhere to principles enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendants also filed a motion for summary judgment on Plaintiffs' claims for personal injury on the basis that Plaintiffs lacked sufficient causation because Dr. Bernstein stated that there were many possible causes for Plaintiffs' allergic reactions. In addition, the parties filed cross-motions for summary judgment on all remaining claims. By separate Memorandum Opinion and Order, the Court granted Defendants' motion to exclude Dr. Bernstein's testimony. The Court is now prepared to rule on the parties' cross-motions fox summary judgment on all claims, including

Defendants' motion for summary judgment on Plaintiffs' claim for personal injury.

II. DISCUSSION

The Defendants are entitled to summary judgment as to the negligence per se and common law negligence claims because Plaintiffs are unable to establish the duty that the Defendants owed, proximate causation, or damages. The Defendants are entitled to summary judgment as to the implied warranty of habitability claim because this claim is precluded by the law of the case. Furthermore, the Defendants are entitled to summary judgment on the conversion claim because Plaintiffs are unable to raise an genuine issue of material fact showing that the Defendants exercised rights over the Plaintiffs chattels to their exclusion or that the mold in the apartment deprived the Plaintiffs of their rights to the chattels. Plaintiffs fail to set forth a claim for punitive damages. Lastly, the Court denies Plaintiffs' motion for summary judgment because the motion is procedurally deficient.

A. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Rule 56(e) requires the nonmoving party to

go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This standard of review sets forth the procedural framework for the Court's analysis; each subsection contains the rule of law that applies to each individual claim.

B. Analysis

1. Negligence Per Se

In order to state a claim for negligence per se, a plaintiff must establish that: (1) the defendant violated a statute that was enacted for public safety; (2) the plaintiff belongs to the class of persons for whose benefit the statute was enacted; (3) the harm that occurred was of the type against which the statute was designed to protect; and (4) the statutory violation was a proximate cause of his injuries. *Halterman v. Radisson Hotel Corp.*, 523 S.E.2d 823, 825 (Va. 2000). The Court finds that Plaintiffs fail to set forth a claim for negligence per se because they fail to establish (1) the duty that the Defendants owed, (2) proximate causation between any breach of that duty and any injury, and (3) any damage that resulted from the alleged breach.

Although Plaintiffs assert violations of several "building codes", the only statute that is on point is the Virginia Residential Landlord Tenant Act ("VRLTA"), Va. Code § 55-248.2, *et seq.* The relevant section is 55-248.13, which provides that a landlord shall maintain fit premises to include:

> (1) compl[iance] with the requirements of applicable building and housing codes materially affecting health and safety; (2) mak[ing] all repairs and do[ing] whatever is necessary to put and keep the premises in a fit and habitable condition; . . . ; (4) maintain[ing] in good and safe working order and

> condition all electrical, plumbing, sanitary, HVAC, required to be supplied by the landlord; . . . .

The statute further provides that a tenant may recover damages and obtain injunctive relief for noncompliance by the landlord with the provisions of the rental agreement or of the statute. Va. Code §§ 55-248.21 and -248.40. Thus, central to Plaintiffs' claim is a finding that the apartment at the Westfield Village Apartments was "uninhabitable." To establish that mold presents a potential health hazard, the types of molds, the mycotoxins produced by these molds, and the individuals' responses or reactions to these mycotoxins must be assessed. (Ginste Dep. at 64:6-65:16.) This assessment is outside the knowledge of a layperson and must be made and presented by qualified experts.

Plaintiffs proffer the testimony of Ronald Ginste, their expert in industrial health hygiene, to support their contention that the Roches' apartment was uninhabitable. However, in his deposition, Mr. Ginste testified that he had no opinion as to whether Plaintiffs' apartment was unfit and uninhabitable. (*Id.* at 150:18-151:1.) Mr. Ginste stated that, in order for him to determine whether the mold in the Plaintiffs' apartment was toxic, he would have to know the level of mycotoxins that were present in the apartment. (*Id.* at 64:6-65:16.) Plaintiffs counter that Mr. Ginste was awaiting certain test results when he was deposed and that the test results showed that the mold found in the apartment was producing mycotoxins and that this rendered the apartment uninhabitable.

There are several problems with Mr. Ginste's testimony and the subsequent affidavit. First, the test was performed on a bulk sample obtained from the Plaintiffs' apartment, not at the apartment; and the test was done one year after the sample was removed from the apartment. (Bertram Dec., Ex. 3 at B.) Second, the testing merely demonstrated that mycotoxins grew out of the mold spores on one of the samples, but fails to establish

the level or quantity of mycotoxins present in the apartment. Third, Mr. Ginste admits, in his affidavit, that his opinion regarding habitability was based partly on his discussions with Dr. Jarvis (the owner of the laboratory performing the mycotoxin test) (Pls.' Mem. Opp'n Summ. J., Ex. 24); thus, Mr. Ginste's opinion on this fact is based on inadmissible hearsay. Fourth, Mr. Ginste's affidavit contradicts his deposition testimony, and, generally, where a party submits an affidavit that contradicts their deposition testimony, the courts disregard the affidavit for summary judgment purposes. *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999). Fifth, Mr. Ginste also conceded at his deposition that he did not consult with any physician or toxicologist after he tested the apartment to determine whether the mold in Plaintiffs' apartment was hazardous or posed health risks. (Ginste Dep. at 58:12-59:5.) From the foregoing, Mr. Ginste's expert opinion fails to establish that the apartment was uninhabitable, and the Plaintiffs cannot establish that Lincoln or SWIB failed to maintain the facilities in a habitable condition in violation of the VRLTA.

Plaintiffs also contend that the Defendants violated certain building codes, specifically a regulation providing that plumbing fixtures shall be properly installed and maintained in good working order. (*See* Pls.' Mem. Opp'n Summ. J. at 19-20 (citing BOCA National Property Maintenance Code, § PM-505.1 (5th Ed. 1996)).) Plaintiffs' reliance on this code provision is inapposite because they are not contending that the plumbing fixtures in their apartment were not operational, unsafe or unsanitary. The Court finds, however, that Plaintiffs fail to offer any evidence demonstrating the duty and or the industry standards imposed by the VRLTA or any building code or how the Defendants violated the VRLTA or other various statutes or codes. Plaintiffs also maintain that the fact that the Defendants engaged in the remediation of the apartment is evidence that the apartment was uninhabitable; however, evidence of remediation is inadmissible

under the subsequent remedial measures doctrine of the Federal Rules of Evidence. Fed. R. Evid. 407; *see Albrecht v. Baltimore & Ohio RR Co.*, 808 F.2d 329, 331-32 (4th Cir. 1987). Thus, Plaintiffs fail to establish that Defendants violated any applicable building code or statute.

Assuming, *arguendo*, that Plaintiffs establish that the Defendants violated a statute or building code, the Court finds that Plaintiffs satisfy the second element of a claim for negligence per se: Plaintiffs belong to the class of persons for whose benefit the statue [*sic*] was enacted – tenants. Defendants do not dispute this finding. As to the type of harm against which the statute was designed to protect, the Plaintiffs' alleged injuries could arguably have resulted from the mold found within the apartment; thus, the Court finds that Plaintiffs meet the third element of a negligence per se cause of action – but only for argument purposes.

As to proximate causation, the Court holds that from the exclusion of the expert testimony by Dr. Bernstein that summary judgment is proper in favor of the Defendants: there is insufficient evidence of causation to create a genuine issue of material fact. In general, expert testimony is required to prove that exposure to a certain substance caused a certain injury or illness. *See Cavallo v. Star Enterprise*, 892 F. Supp. 756, 774 (E.D. Va. 1995), *rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996) (requiring expert testimony to establish proximate causation between exposure to AvJet fumes and chronic respiratory problems); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) (requiring expert testimony to establish nexus between ibuprofen and renal failure). Based on the Court's findings of fact and conclusions of law in its Memorandum Opinion of July 25, 2003, excluding Dr. Bernstein's testimony as to proximate causation for the Plaintiffs' personal injuries, the Court concludes that Defendants are entitled to summary judgment

on Plaintiffs' claim for personal injuries resulting from Defendants' negligence per se.

As to the alleged damages to their chattels, Plaintiffs fail to proffer any evidence that their personal property was damaged through Defendants' alleged negligence. Plaintiffs maintain that their chattels were damaged by the mold in the apartment. However, no tests were performed, by either party, to determine the presence of mold within the chattels – except for the motor vehicle. Mr. Ginste did not perform any tests on the Plaintiffs' personal property, other than their vehicle. Plaintiffs argue that the proof of damage to their property by mold lies in the fact that their personal property was removed from the apartment by BARCO in full body protective clothing, masks and gear. Further evidence is BARCO's designation of two trailers of belongings: one for items that could be decontaminated and the other for items that should be discarded. Arguably, these circumstances would tend to show that the personal property had been contaminated; however, the Plaintiffs have not offered any objective findings or evidence to support their claim that their chattels were proximately damaged by Defendants' negligence per se. Plaintiffs offer only unsubstantiated arguments and theories and fail to raise any genuine issues of material fact as to the damage to their personalty caused by the Defendants' alleged negligence per se. From the foregoing, the Court holds that Defendants are entitled to summary judgment on Plaintiffs' claim for damages to their personal property as a result of Defendants' negligence per se.

2. Common Law Negligence

Plaintiffs fail to set forth, in the Second Amended Complaint, any claim for ordinary negligence. Under Virginia law, the essential elements of a negligence claim are: (1) the identification of a legal duty of the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff proximately caused by the breach. *Talley v.*

Danek Medical, Inc., 179 F.3d 154, 158 (4th Cir. 1999). The standard of conduct that a party must conform to is that of "a reasonable man under like circumstances." *Id.* The burden is "upon the plaintiff to show that the defendants deviated from the standard of ordinary care, either by failing to observe applicable trade customs and building code provisions or by some other defalcation." *Morrison-Knudsen Co. v. Wingate*, 492 S.E.2d 122, 124 (Va. 1997). Plaintiffs argue that the Defendants breached their duty of due care by failing to disclose that the apartment had a latent defect, mainly that the apartment contained "recalled leaky pipe[s]." (Pls.' Mem. Opp'n Summ. J. at 25.) Plaintiffs also maintain that the Defendants were negligent in replacing the polybutylene piping and in their remediation efforts. (*Id.*)

Plaintiffs contend that *Powell v. John E. Hughes Orphanage*, 138 S.E. 637, 641 (Va. 1927), establishes a duty upon the landlord to notify the tenant, at the time the tenant takes possession of the property, of any dangerous conditions. Plaintiffs offer the Defendants' mold policy, which was in effect when the Plaintiffs moved into the apartment, to support their contention that the Defendants had notice of how mold developed and that this mold could be dangerous. Contrary to Plaintiffs' interpretation of *Powell*, that case stands for the proposition that a landlord must put the tenant on notice of any dangerous condition at the time the tenant takes possession of the property. *Id.* Plaintiffs, however, have failed to offer any evidence that the Defendants had prior knowledge that the polybutylene piping in Plaintiffs' apartment created a dangerous condition. Plaintiffs maintain that the Defendants, through their standing policy on mold, had prior knowledge that the Roches' apartment contained polybutylene piping and that this type of piping could develop leaks. However, this fact alone does not establish that the Defendants knew that these leaks were present in Plaintiffs' apartment prior to their moving in. Plaintiffs fail to

carry their burden on this point and fail to raise any genuine issue of material fact.

As to Plaintiffs second theory of recovery under common law negligence that the Defendants were negligent in replacing the polybutylene piping and in their remediation efforts, Plaintiffs contend that the standard of care is the customary industry standard set forth in the Defendant's own policy on handling mold cases combined with those standards established by the Environmental Protection Agency ("EPA"), the Center for Disease Control and Prevention ("CDC") and the state health departments. Plaintiffs, however, fail to set forth any specific provisions, of the regulations issued by the aforementioned agencies, that establish an industry standard. Plaintiffs fail to provide any qualified expert testimony concerning the nature and existence of the leaks, the corrective measures taken by Defendants, and how the Defendants violated the specific trade customs or building codes. Plaintiffs have also not identified any witnesses who will testify as to the "customary industry standards," including: (1) the replacement of polybutylene piping; (2) standards for inspecting heating and air conditioning units, substrate duct material, and condensation drain lines and filtration systems employed in heating, ventilation and air conditioning systems; (3) standards of repairing leaks and waterproofing apartments in order to prevent mold; or (4) standards for selecting appropriate remediation systems that would have prevented mold formation. (Second Am. Compl. ¶ 53.) Plaintiffs cite to the Defendants' own policies on the treatment of mold as establishing an appropriate standard of care. However, a corporation's internal policies do not create a legal standard of care. *Pullen v. Nickens*, 310 S.E.2d 452, 456 (Va. 1983). Consequently, Plaintiffs cannot establish that Defendants were negligent simply for failing to comply with their own internal policies. Thus, Plaintiffs fail to adduce evidence of the relevant standard of care and Defendants are entitled to summary judgment as a matter of law.

As discussed in Part II.B.1., *supra*, Plaintiffs fail to establish proximate causation between any negligence on Defendants' part and their personal injuries or damage to their personal property. Therefore, for the reasons stated above, Defendants are entitled to summary judgment as a matter of law as to Plaintiffs' claim of common law negligence.

3. Breach of Implied Warranty of Habitability

By an Order dated November 27, 2002, the Court dismissed, as a matter of law, Plaintiffs' claim under a breach of an implied warranty of habitability. Plaintiffs re-assert their claim under the auspice that "when this Count was refiled, it was in a different version and differently worded." (Pls.' Mem. Opp'n Summ. J. at 26.) Plaintiffs contend that there is an implied warranty of habitability that arises from the landlord's duties to provide reasonably safe premises and to perform its maintenance work in a workmanlike manner. (*Id.*) Furthermore, Plaintiffs allege, that an implied warranty of habitability arises from VRLTA's statutory warranty – an implied warranty that the apartment would be habitable and free from toxic and dangerous materials. (*Id.* at 27.) The Court's previous Order, addressing this matter on point, is the law of case, and Plaintiffs are precluded from asserting this claim. The existence of an express warranty voids the necessity for an implied warranty. For the reasons stated in the Court's Order of November 27, 2002, the Court grants Defendants' motion for summary judgment on the breach of implied warranty of habitability claim.

4. Conversion

Under Virginia law, conversion is "the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights." *Economopoulos v. Kolaitis*, 528 S.E.2d 714 (2000). There is no conversion "if the taking is with recognition of the owner's rights, i.e., without

intent to deprive the owner of the property." Friend's Virginia Pleading and Practice § 27-13(1). In this case there are two potential conversion claims: (1) BARCO and the Defendants converted the Plaintiffs' personal property when they removed the property from the apartment, withheld the property and lost some of Plaintiffs' belongings, and (2) the Defendants converted Plaintiffs' property by exposing the property to mold to the extent that it was unsafe for the Plaintiffs to continue to possess it.

As to the first claim, BARCO removed the Plaintiffs' personal property from the apartment with the Plaintiffs' consent. The Parties had several discussions regarding the removal and remediation of the Roches' chattels. However, the Plaintiffs were not satisfied with the results that BARCO's remediation provided, and Plaintiffs' counsel subsequently notified BARCO that any action, without Plaintiffs' approval, was considered a conversion and an intentional act. Thus, BARCO continues to possess the Plaintiffs' property, and the Plaintiffs have not sought to either inspect or to retrieve their chattels from BARCO. Therefore, as a matter of law, the Plaintiffs fail to establish that the Defendants wrongfully exercised control over their chattels. The undisputed evidence demonstrates that the Plaintiffs consented to the removal of their personal property by BARCO and have abandoned it.

Plaintiffs also contend that BARCO and the Defendants failed to properly account and inventory their personal property because they are missing several valuables which were not found on any of BARCO's inventory lists. Plaintiffs rightfully assert that BARCO may have converted these valuables. However, for purposes of this case, BARCO is not a named defendant. Furthermore, conversion is an intentional tort, and, generally, a principal is not liable for its agent's intentional torts. Thus, if Lincoln or SWIB is the principal and BARCO is the agent, neither Lincoln nor SWIB could be liable for the intentional torts committed by BARCO.

As to their second conversion claim, that the Defendants converted their personal property by exposing their property to the mold in their apartment, Plaintiffs cite to BARCO's inventory list that identified personal property that could be decontaminated and personal property that should be disposed. However, BARCO's categorization was based upon whether the item was porous or nonporous. BARCO had not tested any of Plaintiffs' chattels to determine if they were in fact contaminated. Mr. Ginste, Plaintiffs' expert, did not test any of the Plaintiffs' personal property, outside of their vehicle, for contamination. Thus, even if BARCO classified an item in the "disposed" category, that item would not necessarily have to be disposed if a test would show that the item was not contaminated. Furthermore, there is no evidence that the items contained any mold at all, or whether the items were unsafe. Plaintiffs have failed to establish, as a matter of law, that the mold in the apartment had deprived them of their right to their chattels. For these reasons, Defendants are entitled to summary judgment on Plaintiffs' claim of conversion.

5. Punitive Damages

The Court had previously dismissed Plaintiff's claim for punitive damages because the Plaintiffs had failed to proffer any facts to support that claim. *See Roche v. Lincoln Property Co.*, No. 02-1390 (E.D. Va. November 27, 2002). Plaintiffs make identical allegations in their Second Amended Complaint regarding an award of punitive (or exemplary) damages. Defendants compare, in detail, the Plaintiffs' punitive damage allegations in their Second Amended Complaint to their original Motion for Judgment. The Plaintiffs fail to assert any basis for the Court to reverse its November 27, 2002 ruling dismissing Plaintiffs' punitive damages claim. Plaintiffs contend that Judge O'Grady, in a February 14, 2002 hearing, allowed the punitive damages claim to go forward; however, they mischaracterize Judge O'Grady's holding. Judge O'Grady

specifically stated that the Plaintiffs had alleged punitive damages in their Second Amended Complaint; however, the decision to allow this claim to go forward should be determined by this Court. Therefore, for the reasons stated in the Court's November 27, 2002 Order, the Court grants summary judgment in favor of the Defendants as to the Plaintiffs' claim for punitive damages.

6. Plaintiffs' Motion for Summary Judgment and Its Procedural Deficiencies

Although Plaintiffs filed a separate motion for summary judgment, the Court finds that the Plaintiffs' motion is procedurally deficient. Thus, in addition to granting Defendants' motion for summary judgment on its merits, the Court denies Plaintiffs' motion for summary judgment, as a matter of law, because of the motion's lack of compliance with the mandates of Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7(E) and 56(B).

Plaintiffs filed a five-page motion for summary judgment and failed to include a memorandum in support and failed to include any supporting evidence or authority demonstrating that they are entitled to summary judgment. Plaintiffs contend that "[f]ro (sic) the reasons to be stated in the Memorandum, supporting Affidavits, and arguments contained in the Response to Defendant's Motion for Summary Judgment, the plaintiffs are entitled to summary judgment on all three Counts." (Pls.' Mot. Summ. J. at 1.) Plaintiffs further contend that "[t]he arguments set forth in the plaintiffs' Responses are hereby incorporated as if fully set out, and the plaintiffs accordingly reserve the right to supplement this Motion with the Responses and arguments to the defendant's Motion for Summary Judgment, pursuant to Rule 56(c) and (e)." (*Id.*)

Outside of Rule 56, Plaintiffs fail to cite any authority for their contention that they can maintain a motion for summary judgment without setting forth any supporting evidence as to why they are entitled to summary judg-

ment. Under Rule 56(c), the moving party must identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-32. Under Local Rule 7(E), motions for summary judgment must "be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies." Also, under Local Rule 56(B), the moving party must also set forth a specifically captioned section "listing all material facts as to which the moving party contends there is no genuine issue and cite the parts of the record relied upon to support the listed facts as alleged to be undisputed."

Plaintiffs fail to comply with those mandates. In their motion for summary judgment, the Plaintiffs fail to cite to any part of the record to support their various contentions for summary judgment. Plaintiffs set forth eight numbered paragraphs as their undisputed material facts, yet they fail to cite to the record for any of these factual propositions. In the absence of any evidence to support their motion, Plaintiffs fail to demonstrate that they are entitled to summary judgment on any of their claims. In their rebuttal brief, Plaintiffs proffer that their miser motion for summary judgment was the result of Plaintiffs taking into account that the Court had established a briefing schedule for cross-motions for summary judgment and that they wanted to avoid burdening "the Clerk's Office and the law clerks with having voluminous sets of documents on Cross-Motions for Summary Judgment." (Pls.' Rebuttal at 1.) However, Plaintiffs should be mindful that the Court is the one that decides when it will grant a party leave to file or submit a pleading outside the schedules and rules established under the Federal Rules of Civil Procedure; in this particular instance, the Court did not grant the Plaintiffs discretion to determine on their own if they would comply with the federal rules. Thus,

the Court denies Plaintiffs' motion for summary judgment because Plaintiffs fail to set forth any evidence that there are no disputed material facts; furthermore, Plaintiffs fail to establish that they are entitled to judgment as a matter of law.

III. CONCLUSION

The Court grants summary judgment in favor of the Defendants as to all counts. Plaintiffs fail to present a claim for either negligence per se or common law negligence because they fail to establish the duty that the Defendants owed, proximate causation, or any damages or injuries. Defendants are entitled to summary judgment on the implied warranty of habitability claim because the law of the case has established that there is no implied warranty of habitability between a landlord and a tenant. Furthermore, Plaintiffs fail to establish a claim for conversion because they are unable to show either how the Defendants have exercised rights over their chattels to their exclusion or how the mold in the apartment had deprived them of their right to the chattel. Defendants are entitled to summary judgment on Plaintiffs' claim for punitive damages because the Court had previously ruled that the Plaintiffs' initial Motion for Judgment had failed to set out sufficient facts to support a claim for punitive damages and Plaintiffs' Second Amended Complaint does not cure these deficiencies. Finally, the Court denies Plaintiffs' motion for summary judgment because of its procedural deficiencies and because of Plaintiffs' failure to demonstrate that there are no genuine issues of material fact in dispute and that they are entitled to judgment as a matter of law. From the foregoing, it is hereby

ORDERED that Defendants, Lincoln Property Company's and the State of Wisconsin Investment Board Investment Company's, Motions for Summary Judgment are GRANTED as to all counts. It is further

ORDERED that Plaintiffs, Christophe and Juanita Roche's, Motion for Summary Judgment is DENIED.

The Clerk is directed to forward a copy of this Memorandum Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT PROPERTY,
Defendants.

[Filed July 25, 2003]

JUDGMENT

Pursuant to the order of this Court entered on July 25, 2003, and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the defendants, Lincoln Property Co. and SWIB Investment Co., and against plaintiffs, Christophe Roche and Juanita Roche.

Elizabeth H. Paret, Clerk

By: /s/ [illegible]
Deputy Clerk

Alexandria, Virginia
July 25, 2003

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants, Lincoln Property Company's ("Lincoln") and the State of Wisconsin Investment Board's ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D., and for summary judgment on all claims for personal injury. This case concerns Plaintiffs Christophe and Juanita Roche's claim for personal injuries stemming from exposure to alleged toxic levels of mold in their apartment. The Roches contend that Defendants negligently failed to properly maintain their apartment and allowed toxic levels of mold to develop, causing the Roches and their family to suffer respiratory and other medical problems. The issue before the Court is whether Dr. Bernstein's testimony regarding the proximate cause of the Plaintiffs' personal injuries, allegedly resulting from exposure to toxic levels of mold, satisfies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. For the reasons stated herein, the Court concludes that Dr. Bernstein's testimony lacks, as to the proximate cause of Plaintiffs' personal injuries, a methodology satisfying *Daubert* because: (1) Dr. Bernstein failed to adhere to the established methodology of differential diagnosis by not ruling in the suspected causes and by not ruling out other possible causes; (2) he failed to establish why various reports and studies showing some correlation between exposure to mold and allergic reactions support his conclusions that the mold in the apartment was the proximate cause of Plaintiffs ailments, and (3) he relied solely on temporal relation to arrive at his conclusions.

I. BACKGROUND

Christophe and Juanita Roche and their children lived in an apartment at Westfield Village from April 2001 to March 2002. The Roches claim that their apartment was poorly maintained, that there were water leaks, holes in the wall, and mold growing within the apartment. The Roches contend that, as a result of being exposed to toxic levels of mold, they currently suffer respiratory and other ailments.

Plaintiffs leased their apartment from SWIB. Lincoln managed the Westfield Village Apartments in Centreville, Virginia. Plaintiffs complained to Lincoln on several occasions about the poor condition of their apartment. Plaintiffs complained of water leaks needing repair, of holes that had been cut in the wall, of the carpet being torn up, and of "the fact that mold was all over [the] apartment." (Compl. ¶ 17.) Plaintiffs allege that toxic levels of mold developed within the apartment due to moisture damage from the leaky fixtures and plumbing. In February 2002, Plaintiffs engaged a consultant, Ronald G. Ginste of Potomac Environmental Testing Services, to conduct testing for the presence of mold in the apartment, and the consultant discovered that there was "extensive" mold contamination in the apartment. (*Id.* ¶ 28.) Specifically, Mr. Ginste found several types of molds present in

the apartment: Stachybotrys, Cladosporium, Penicillium, Aspergillus, Smuts, Hyphal elements, and epicoccum.

Subsequent to leaving the apartment in March 2002 and after having filed this action, Plaintiffs sought treatment from Dr. Bernstein, an allergist. Mr. Roche complained of memory loss, chronic headaches, sinus problems, mild hypersensitivity to smells, and chronic nasal stuffiness. (Defs.' Mem. Supp., Ex. D. at 2.) Mrs. Roche complained of memory loss, chronic upper respiratory sinus symptoms, some chest congestion, and shortness of breath. (*Id.* at 4.) Dr. Bernstein first examined the Plaintiffs on December 24, 2002. After his initial examination, Dr. Bernstein wrote to the Plaintiffs stating that he believed they were dealing with two health issues: first, the allergenic effects of the molds to which the Plaintiffs were exposed, primarily Cladosporium and Aspergillus; second, sick-building symptoms "which were probably secondary to the mycotoxic effects of the Stachybotrys, which can also be seen with Aspergillus." (*Id.* at 1.) Dr. Bernstein recommended that Mr. Roche stop smoking, that the Roches find a new home for their cat, and that they start a low-sugar diet. (*Id.*) In his inter-office report, Dr. Bernstein noted that Mrs. Roche had a history of asthma. (*Id.* at 4.) Dr. Bernstein scheduled the Plaintiffs for allergy testing. (*Id.* at 3, 5.)

On February 12, 2003, the Plaintiffs presented themselves for allergy testing through skin endpoint titration. Dr. Bernstein found that Mr. Roche was allergic to several common allergens found in Northern Virginia; however, Mr. Roche was not allergic to the molds found in the apartment – namely Aspergillus, Cladosporium, or Penicillium. (Bernstein Dep. at 14:9-20:9.) Mr. Roche was allergic to mites, cockroaches, cats, dust, most weeds and grasses he was tested for, and all trees in the test. In addition, Mr. Roche smoked about 8 cigarettes per day, and the family owned a cat. Dr. Bernstein repeated his prior recommendation that Mr. Roche stop smoking because

smoking is a "nonspecific irritant" which makes allergic symptoms worse. (*Id.* at 20:10-21:11.) He restated his recommendation that Mr. Roche find a new home for the cat. (*Id.* at 20:10-12.) As to Mrs. Roche, Dr. Bernstein found that she was allergic to most allergens, including the molds Aspergillus, Cladosoporim, and Penicillium. (*Id.* at 21:12-23:7.) Mrs. Roche was also allergic to cats. Dr. Bernstein also recommended that Mrs. Roche get rid of the cat. (*Id.* at 23:11-21.) Dr. Bernstein, however, performed no testing addressing the Plaintiffs' reaction to Stachybotrys because Dr. Bernstein does not consider Stachybotrys to be an allergen. (*Id.* at 26:20-27:9.)

The Scheduling Order in the case required that the Plaintiffs designate expert witnesses pursuant to Federal Rule of Civil Procedure 26 and to comply with the other mandates of the statute by December 15, 2002. *See* Fed. R. Civ. P. 26(a)(2). On December 27, 2002, the Plaintiffs designated Dr. Bernstein as one of three experts; Plaintiffs failed to provide any of the required disclosures under Rule 26(a)(2), i.e., the expert report. Defendants moved to bar Dr. Bernstein's testimony based on Plaintiff's failure to submit a Rule 26 report. Magistrate Judge Sewell denied the motion because he found that Dr. Bernstein was a treating physician under *Hall v. Sykes*, 164 F.R.D. 46 (E.D. Va. 1995), and, therefore, exempt from the expert report requirement. Thus, Plaintiffs did not need to submit a report to the extent that Dr. Bernstein was going to testify about his treatment of the Plaintiffs.

Defendants now bring two motions. First, Defendants seek to exclude Dr. Bernstein's testimony as to specific causation for both Plaintiffs for failure to adhere to the principles enunciated in *Daubert* because Dr. Bernstein "has no appropriate methodology to opine that molds in the apartment contributed to any health problems." (Defs.' Mem. Supp. at 1 .) Defendants contend that Dr. Bernstein has failed, as part of his differential diagnosis, to rule-in Stachybotrys as one of the molds that caused

Plaintiffs' injuries. Furthermore, Dr. Bernstein failed to rule-out, as to both Plaintiffs, the other commonly found allergens as potential causes for Plaintiffs' injuries. Defendants also claim that Dr. Bernstein has failed to rule-in Aspergillus, Cladosporirum, and Penicillium as causes for Mr. Roche's injuries because Mr. Roche did not react to these three molds. In response, Plaintiffs contend that Dr. Bernstein's conclusion that their symptoms were caused by exposure to molds is supported by his findings. Mainly, Dr. Bernstein found that the Plaintiffs were asymptomatic when they arrived at the Westfield Village apartment. Dr. Bernstein also referred to literature relating to Stachybotrys and sick-building syndrome he had read and on his previous experience with sick-building syndrome patients. Dr. Bernstein also relied on Mr. Ginste's report on the air sampling of the Roches' apartment, which broke down the specific levels of the various molds found throughout the apartment; and he relied on the P. K. Jarvis Toxin Report, which indicated the types of toxins that were present and produced by the Stachybotrys in the Roches' apartment. Defendants' second motion, in the alternative, is for summary judgment. Defendants contend that the Plaintiffs lack sufficient causation because Dr. Bernstein has stated that there were many possible causes for Plaintiffs' allergic reactions.

The Court heard oral argument on the motions on April 2, 2003; the matters were taken under advisement. The Court reviewed the record, the parties' arguments, and the relevant case law; on April 16, 2003, the Court issued an Order granting the motion to exclude Dr. Bernstein's testimony for the reasons to be stated in a subsequent memorandum opinion. Although both motions are before the Court, this Memorandum Opinion addresses only the motion to bar Dr. Bernstein's testimony. The Court addresses the motion for summary judgment in a separate order addressing the parties' cross-motions for summary judgment on all remaining claims.

II. DISCUSSION

A. Standard of Review

The Federal Rules of Evidence provide the Court with the power to determine any "preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence . . . ." Fed. R. Evid. 104(a). In determining the admissibility of expert testimony, the Court relies on Federal Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Glossing on Rule 702, the United States Supreme Court emphasized that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Thus, conjecture or "subjective belief" or "unsupported speculation" will not suffice. *See id.* at 590. In performing this "gatekeeping" task, the Court must make a preliminary assessment of "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Courts generally consider four factors in determining whether the theory or technique is "scientifically valid": (1) whether the theory or technique used by expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of the method's or conclusion's acceptance

within the relevant scientific community. *Daubert*, 509 U.S. at 593-94; *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995). This list of factors, however, is not exhaustive; courts have considered other factors in assessing whether an expert's testimony is reliable.[1] These factors include: (1) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion[2] and (2) whether an expert has accounted for obvious alternative explanations.[3] As part of the second prong, the Court must determine whether the expert testimony is relevant to an issue in the case. *Daubert*, 509 U.S. at 591-92. While the "scientifically valid" and the "relevance" prongs are distinct in their inception, the two prongs may overlap in a particular case. Thus, "a determination regarding the scientific validity of a particular theory requires not only an examination of the trustworthiness of the tested principles on which the expert opinion rests, but also an analysis of the reliability of an expert's *application* of the tested principles to the particular set of facts at issue." *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 762-63 (E.D. Va. 1995), *rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996). These are the

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[1] *See* Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendments.

[2] *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); *see also Schmaltz v. Norfolk & Western Ry. Co.*, 878 F. Supp. 1119, 1122 (N.D. Ill. 1995) ("The analytical gap between the evidence presented and the inferences to be drawn on the ultimate issue . . . is too wide in the present case."); *Chikovsky v. Ortho Pharmaceutical Corp.*, 832 F. Supp. 341, 346 (S.D. Fla. 1993) (citing the expert's ignorance of the amounts of Retin-A absorbed by the plaintiff, noting the absence of any established dose-response relationship for Vitamin A and birth defects, and finding that the expert's "analogies to research concerning Vitamin A and other Vitamin A derivatives is [sic] wanting").

[3] *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).

principles that govern the Court's assessment of Dr. Bernstein's opinions.

B. Dr. Bernstein's Testimony

Dr. Bernstein is board certified in internal medicine and pulmonary diseases; however, he is not board certified as an allergist. In his affidavit of March 24, 2003, Dr. Bernstein states:

> I am in a position to state that Mr. and Mrs. Roche were previously healthy but became ill following a mold exposure in the apartment in which they had been living for one year. Mrs. Roche had allergic symptoms as a child, but she had been asymptomatic. Mr. Roche developed problems with chronic headaches and nasal stiffness. Mrs. Roche developed symptoms of shortness of breath, sinus congestion and chest congestion. Allergy testing for Mrs. Roche revealed significant allergies to molds, trees, grasses, pollens and dust mite. Allergy testing for Mr. Roche revealed significant allergies to dust mite, cat, molds, weeds, grasses, and trees.

(Pls.' Mem. Opp'n, Bernstein Aff. ¶ 5.) Dr. Bernstein then concludes that, within a reasonable degree of medical certainty, the Roches' symptoms "were caused by their exposure to molds, and that they became sensitized to molds and developed allergies to molds as a result of living in a contaminated apartment." (*Id.* ¶ 6.) Dr. Bernstein notes that his diagnosis is based on differential diagnosis (*id.* ¶ 7) and that "it is significant that [the Roches] were asymptomatic until they moved into the apartment" (*id.* ¶ 6). To form his opinion, Dr. Bernstein relied on: (1) the medical history relayed by the Roches on December 24, 2002 (*id.* ¶ 5); (2) the past medical records, which had been sent to Dr. Bernstein the day before the deposition on February 26, 2003 (*id.* ¶ 1); (3) blood test results, CAT scan results, MRI results, and X-rays (*id.* ¶ 2); (4) a literature review regarding Stachybotrys; (5) the P.K. Jarvis Toxin Report, indicating the type of toxins that were

present and produced by the Stachybotrys in the Roches' apartment (*id.* ¶ 3); (6) the skin endpoint titration testing (*id.* ¶ 5); (7) the RAS Test for Stachybotrys that was performed on the Roches' blood sample (*id.* ¶ 6); and (8) the certified industrial hygienist's – Mr. Ginste – report on the types and quantities of molds found in the Roches' apartment on February 24, 2002.

Although Dr. Bernstein makes his conclusion "within a reasonable degree of medical certainty," his conclusion is vague and generalistic, as it fails to distinguish between harms attributable to the mold exposure and the Roches' allergic reactions to other common allergens, such as cats, dust mites, weeds, grasses, and trees. This omission is fatal to Dr. Bernstein's conclusion and to his methodology of differential diagnosis; the omission is also significant because the Roches may only recover for specific injuries directly attributable to their exposure to the mold found in the apartment. This omission also precludes recovery for symptoms related to the Roches' sensitization to molds – i.e., how exposure to the molds in the apartment injured the Roches in such a way as to render them more susceptible to such symptoms.

C. Analysis

As an initial procedural matter, Plaintiffs proffered Dr. Bernstein to Magistrate Judge Sewell as a "treating physician." However, a review of Dr. Bernstein's deposition, his affidavit which amplifies and contradicts his deposition, and his supplemental report demonstrates that Plaintiffs have expanded Dr. Bernstein's expertise and opinions well within the role of a testifying expert without complying with the Court's Scheduling Order or Federal Rule of Civil Procedure 26. Thus, the Court analyzes Dr. Bernstein's testimony as a testifying expert and not as a treating physician. The Court finds that Dr. Bernstein's testimony is inadmissible because Dr. Bernstein is unable to establish, through any acceptable methodology, that the Plaintiffs were injured by the mold allegedly

contained within their apartment. The Court concludes that Dr. Bernstein's testimony is based on conflicting facts, conflicting reports and literature, fails to rule-in and rule-out several potential allergens, and relies solely on temporal relation; thus, his differential diagnosis is unsupported and unreliable.

1. The Methodology

If scientifically valid, Dr. Bernstein's testimony would clearly be admissible as to causation because it would show that the Roches' exposure to the molds in the apartment caused their illnesses. Thus, the Court focuses its analysis on the scientific validity test under *Daubert*. The Court specifically focuses on the reliability of the methodology employed by Dr. Bernstein and on his adherence to, and application of, that methodology. In his affidavit, Dr. Bernstein states he employed a differential diagnosis methodology to arrive at his conclusion[4]; thus, Dr. Bernstein should have ruled in the various molds that the Roches were exposed to at their apartment, and he should have ruled out all other potential causes to determine that the Roches' injuries were proximately caused by these molds – or at least that the molds aggravated their previous conditions. If faithfully applied, the methodology of differential diagnosis "has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (quoting *Brown v. Southeastern Penn. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)*, 35 F.3d 717, 758 (3d Cir. 1994)). Dr. Bernstein determined from a review of the Roches' medical history, from their blood test results, CAT scan results, MRI results, and X-rays, from a literature review regarding Stachybotrys, from the P.K.

[4] Differential diagnosis is "a process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes . . . of the injuries at issue." *Hines v. Consolidates Rail Corp.*, 926 F.2d 262, 270 n. 6 (3d Cir. 1991).

Jarvis Toxin Report, from the skin endpoint titration testing, from the RAS Test for Stachybotrys, from the certified industrial hygienist's report, and from the timing of their exposure to the molds in their apartment in relation to their development of symptoms that the Roches' exposure to the molds caused their illnesses.

Dr. Bernstein's differential diagnosis is important to determine specific causation.[5] In this case, the specific causation issue is whether Stachybotrys, Penicillium, Aspergillus, and Cladosporium caused the Roches' symptoms and, more specifically, how each of the molds contributed to the Roches' symptomology. A reliable differential diagnosis typically, though not invariably, is performed after "physical examination, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is most likely. *Westberry*, 178 F.3d at 262. "A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion." *Id.* at 265; *see also Cavallo*, 892 F. Supp. at 771 ("If other possible causes of an injury cannot be ruled out, or at least the probability of their contribution to causation minimized, then the 'more likely than not' threshold for proving causation may not be met.").

Dr. Bernstein's differential diagnosis, however, is scientifically invalid and unreliable. First, Dr. Bernstein fails to rule in the molds found in the apartment – specifically Aspergillus, Clasoporium, and Penicillium – as possible causes for Mr. Roche's allergy and flu-like symptoms

[5] In their Memorandum in Support, Defendants acknowledge that the some molds can generally cause allergic reactions – general causation. The issue is Plaintiffs' lack of specific causation.

because Mr. Roche was not allergic to these molds. Second, Dr. Bernstein did not conduct any testing concerning the Roches' susceptibility to Stachybotrys. He notes, however, that the RAS Test for Stachybotrys that was performed on the Roches' blood samples was inconclusive (Bernstein Aff. ¶ 6), although that test revealed that the Roches had not built up antibodies to Stachybotrys (Defs.' Mem. Supp. Ex. F, Ronald E. Gots Dep. 128:1-15).[6] Third, Dr. Bernstein's reliance on the industrial hygienists report is misplaced because Mr. Ginste, in the report, notes that "the severity of exposure is difficult to estimate" and that "no direct link between [the Roches'] health complaints and their exposure can be shown through the methods of this investigation . . . ." (Bernstein Dep. Ex. 1, Mold Investigation Report 5111 Woodmere Dr., Unit 104, 3/17/02 (hereinafter "Mold Investigation Report") at 6.) Furthermore, Dr. Bernstein is not a toxicologist and admitted to lacking any knowledge of the levels required for these various molds to become toxic or of the levels required for the molds to affect the Roches. Thus, he is unable to establish a direct nexus between the levels of exposure to the mold and any subsequent illnesses that overcame the Roches. Fourth, Dr. Bernstein's reliance on articles concerning Stachybotrys and other molds and their effects on humans is erroneous because most of those and other articles state that there are no standards as to what quantity of mold is acceptable in indoor environments with respect to health and that establishing a

[6] In its report on the RAS Test results, Quest Diagnostics notes that the RAS Test has not been cleared or approved by the FDA. Quest Diagnostics further explains that

> "[i]n those patients who have symptoms and physical findings of hypersensitivity pneumonitis ["HP"], the presence of elevated IgG and IgA responses to a mold can be used to support the diagnosis of HP. In the absence of these clinical findings, the IgG and IgA antibody responses only indicate prior exposure [to an] immonuchemically-related fungi."

(Defs.' Mem. Supp. Ex. F, Gots Dep. Ex. 3, 4.)

direct link between mold exposure and health problems is difficult because individuals have different sensitivities to molds. Fifth, Dr. Bernstein fails to state how the "extreme immune inhibitors" produced by the Stachybotrys found in the Roches' apartment and tested at the P.K. Jarvis laboratory proximately caused the Roches' ailments.

Sixth, Dr. Bernstein fails to rule out the Roches' significant allergies to cats, dust mites, grasses, weeds, and trees as potential causes for the Roches' symptoms. Seventh, as to his conclusion that the Roches became sensitized by their exposure to the molds in the apartment, Dr. Bernstein stated in his deposition that it would not be possible to make a determination of sensitization unless the Roches had been tested for allergies prior to moving into the apartment. (*See* Bernstein Dep. 33:7-20.) Eighth, Dr. Bernstein fails to address how his consideration of the blood test results, the CAT scan results, the MRI results, and the X-rays contributed to his determination that the Roches' symptoms came about as a result of their exposure to molds. Ninth, Mrs. Roche's medical history, as relayed by her to Dr. Bernstein, reveals that she had been to the emergency room on several occasions with similar symptoms prior to her moving into the Westfield Village apartment. Thus, Dr. Bernstein's own office files contradict his conclusion that Mrs. Roche was asymptomatic prior to her arrival at the apartment. Tenth, Dr. Bernstein's reliance on temporal causation as the determinative factor in his analysis is suspect because "it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Rule] 702." *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F. Supp. 1119, 1122 (N.D. Ill. 1995). The following is a thorough discussion of the Court's findings and conclusions as to Dr. Bernstein's testimony.

2. Differential Diagnosis

As previously stated, a reliable differential diagnosis must rule in the suspected cause of an injury and rule out other causes or determine which of the remaining explanations is most likely the cause. In order to support his conclusion – that the Roches' symptoms were caused by their exposure to molds and that the Roches became sensitized to molds and developed allergies to molds as a result of living in the apartment, Dr. Bernstein must rule in the suspected molds and rule out other allergens that could potentially cause the Roches' symptoms. Dr. Bernstein has failed to do so in this case, and his differential diagnosis fails to meet the requirements, under *Daubert*, of a scientifically valid methodology.

a. <u>The Medical Tests</u>

Based on the results of the skin endpoint titration testing, it is undisputed that the Roches were allergic to multiple allergens. Mr. Roche was allergic to all weeds tested (Lambs Quarters, Wormwood Sage, S. Ragweed, E. Plaintain, Sheep Sorrel, and Pigweed), to Bermuda and Timothy grasses, to all trees tested (Elder, Sycamore, Cottowood, Oak, Ash, Hickory, Birch, and Elm), to several organisms (Farinae Mite, Cockroach, Cat, and Pt. Mite), to A. Dust and to a few molds (Alternaria, Candida, and Stemphylium).[7] Significantly, the skin endpoint titration

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[7] Dr. Bernstein explains the Skin endpoint titration testing:

> [B]asically, we're using serial delusions [sic] so everything is a 5th dilution, your concentrate is a 1 to 20 dilution, and so a No. 1 would be 1 to 100 dilution, a No. 2 would be a 1 to 500 dilution, a No. 3 would be a 1 to 2500 dilution, a No. 4 dilution . . . 1 to 125000 dilution . . . and so classically what you do is, start off testing at a relatively low concentration, which we all ready [sic] start off at number 6s, which is a 1 to 325,000 dilution because you don't want anyone to have an adverse reaction from the testing; and then you progressively work your way up, and when you get a 7 millimeter wheel that is generally considered

test included Aspergillus, Hormodendrum (hereinafter "Cladosporium"), and Penicillium (three of the molds found in the Westfield Village apartment); however Mr. Roche was not allergic to these three molds. Mrs. Roche was also allergic to a host of allergens including weeds (Wormwood Sage, E. Plaintain, and Pigweed), Bermuda and Timothy grasses, trees (Elder, Cottonwood, Ash, Hickory, and Elm), all organisms tested (Farinae Mite, Cockroach, Cat, Dog, and Pt. Mite), A. Dust, Feathers, and most molds tested (Candida, Cladosporium, Mucor, Penicillium, Stemphylium, Aspergillus, Helminthosporium, Fusarium, Epidermatophyton, and Pullularia). Therefore, as to Mr. Roche, Dr. Bernstein could not objectively rule in Aspergillus, Cladosporium, or Penicillium as potential causes for Mr. Roche's chronic headaches or nasal stiffness. As to Mrs. Roche, Dr. Bernstein could rule in the three molds Aspergillus, Cladosporium, and Penicillium since she reacted to these molds.

b. Ruling in Stachybotrys

The Mold Investigation report revealed that Stachybotrys was also present within the Roches' apartment; however, from his testing, Dr. Bernstein is unable to rule in Stachybotrys as a potential cause. Dr. Bernstein did not directly test the Roches for a reaction to Stachybotrys. Dr. Bernstein admitted to performing no test regarding Stachybotrys because he does not consider Stachybotrys as an allergen. (Bernstein Dep. at 26:20-27:9.) On the other hand, the Roches had undergone laboratory testing which revealed that neither Mr. nor Mrs. Roche had developed antibodies to an immonuchemically-related fungi. (*See* Gots Dep. Ex. 3.) Plaintiffs contend that they could not have undergone direct testing for reactions to Stachybotrys because Stachybotrys produces micotoxins, which

positive as indicative of the person having an allergic reaction to that substance that you're testing.

(Bernstein Dep. at 6:10-7:3.)

are essentially poisons. (Pls.' Mem. Opp'n at 5-6.) They further maintain that the previous Stachybotrys testing was inconclusive because the test is based on finding the antibody to Stachybotrys and that the human body takes considerable time to build such an antibody. (*Id.* at 6.) Furthermore, they contend, the test is not FDA approved. Even accepting Plaintiffs' arguments that the Stachybotrys test is inconclusive, Dr. Bernstein could not reasonably rule in Stachybotrys because (1) Dr. Bernstein is an allergist – not a toxicologist, a microbiologist, or an industrial hygienist – and he does not consider Stachybotrys an allergen, (2) he performed no test as to the Roches' sensitivity to Stachybotrys, and (3) the one test that was performed on the Roches' blood revealed that they had not built up any antibodies to Stachybotrys. Thus, Dr. Bernstein, in the absence of objective medical findings, rules in Stachybotrys as a potential cause for the Roches' illnesses and bases his reasoning on several articles he read prior to, and subsequent to, his deposition, on his prior experience with other patients who have been exposed to Stachybotrys, and on his experience with patients suffering from "sick-building" syndrome.

c. A Toxicologist's Methodology

Although not addressed by either party in their multiple briefs, the Court finds that Dr. Bernstein's next step was to determine whether the particular molds could have caused the Roches' injuries – that is, whether the Roches' exposure to the specific levels of molds found in the apartment could have actually caused their injuries. Thus, although Dr. Bernstein is not a toxicologist, he must nonetheless apply the principles and methods of toxicology if he is to give an opinion on an issue relating to that specialty.[8] *Cavallo*, 892 F. Supp. at 771-72. In

[8] In analyzing whether a particular level of exposure to mold caused the Roches' illness, Dr. Bernstein is considering principles in immunology. However, in the absence of other standards argued by the parties,

Cavallo, the court addressed the methodology adopted for toxicologists, used by the toxicology expert in that case and endorsed by the World Health Organization, the National Academy of Sciences, and various agencies of the United States Government. *Id.* at 764. That methodology requires that:

> First, an evaluation is made of the [molds] to which the individual might have been exposed, and of the concentrations of these [molds] in air breathed by the individual. The second step involves an evaluation, based on the published scientific literature, of the exposures necessary to produce the adverse effects associated with the [molds] to which the individuals may be exposed. These two evaluations are then combined in the final step of the risk assessment to provide an estimate of the likelihood that any of the harmful properties of any or all of the [molds] might have been expressed in the exposed individual.

Id. In his affidavit, Dr. Bernstein fails to set forth any of these findings with any specificity; however, considering the record, the Court concludes that Dr. Bernstein lacks any knowledge of the levels of exposure to mold required to manifest any symptoms. Furthermore his reliance on several articles, addressed in his deposition, is misplaced because those articles and others, which have become part of the record, reveal that there are no quantitative standards or guidelines for assessing whether the mold contamination in an area is acceptable or not. Dr. Bernstein's reliance on his anecdotal experience to form a conclusion as to specific causation is unfounded because his anecdotal experience is not based on the methods of science. Thus, Dr. Bernstein's inclusion of the various molds lacks scientific support and is suspect.

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the Court finds the toxicology methodology addressed in *Cavallo* instructive.

i. *Mold Evaluation*

The results of the test of the Roches' apartment, conducted by Potomac Environmental Testing Services ("PETS") using "wipe sampling," "bulk sampling," "Burkard air sampling," and 'Anderson air sampling" form a building block in the first step of the analysis. From the bulk sampling, PETS found 3,920,000 colony forming units per gram (cfu/g) of Stachybotrys within the HVAC closet ceiling, 40,000 cfu/g of Cladosporium and 40,000 cfu/g of Penicillium. Inside a duct from the HVAC unit, PETS found 1,027,000 cfu/g of Penicillium and 156,000 cfu/g of Cladosporium. As a result of the Burkard air sampling, PETS found 1,056 spores per cubic meter (spores/m^3) of Stachybotrys in the living room – compared to 0 spores of Stachybotrys found in the outdoor patio. They also found 308 spores/m^3 of Cladosporium within the living room and 22 spores/m^3 in the outdoor patio. Using the Anderson Air Sampler, PETS found 627 colony forming units per cubic meter (cfu/m^3) of Stachybotrys within the living room and none in the outdoor patio. PETS also found 179 cfu/m^3 of Aspergillus in the living room and none in the outdoor patio. They further found 141 cfu/m^3 of Cladosporium within the living room and 237 cfu/m^3 in the outdoor patio. As a result of their analysis of the wipe-samples, PETS found 10,010 colony forming units per square inch (cfu/in^2) of Penicillium within the HVAC closet drain pan and 93,600 cfu/in^2 within the linen closet. PETS also found 31,200 cfu/in^2 of Aspergillus within the linen closet and 14,030 cfu/in^2 in the front bathroom – of which 2,070 cfu/in^2 were Aspergillus versicolor. Finally, PETS found 3,901 cfu/in^2 of Stachybotrys in the front bathroom.

ii. *Literature Review*

Dr. Bernstein lacks personal knowledge of what levels of exposure are considered toxic or dangerous to human health, or even what levels of exposure trigger allergic reactions. (Bernstein Dep. at 76:20-77:4.) Furthermore,

Dr. Bernstein is not a toxicologist, nor has he received any training in toxicology. (*Id.* at 65:8-11.) Dr. Bernstein relies solely on published articles to form an opinion that exposure to the specific levels of Stachybotrys causes cognitive injuries, that Aspergillus causes both cognitive injuries as well as allergic reactions, and that Penicillium and Cladosporium cause allergic reactions. Although Dr. Bernstein finds support in the literature for his conclusion that Aspergillus, Cladosporium, Penicillium, and Stachybotrys can cause the Roches' symptomology, he fails to provide any scientifically valid basis to support his leap from these articles to his conclusions on specific causation.

As stated in his deposition testimony, Dr. Bernstein relied upon several articles and statements to form his opinions on proximate causation in this case. Dr. Bernstein references articles in the *Journal of Asthma* and in *Clinical Toxicology* for the proposition that Stachybotrys caused the Roches' cognitive injuries, such as chronic headaches, memory loss, and perhaps hypersensitivity to smells and that molds caused the Roches' allergies and respiratory illnesses. (*Id.* at 35:6-36:12.) In the article from the *Journal of Asthma*, the authors discuss several studies, from various locations, which have investigated the links between molds, specifically Stachybotrys, and health related symptoms. *See* Massoud Mahmoudi & M. Eric Gershwin, *Sick Building Syndrome, III., Stachybotrys chartarum*, 37 Journal of Asthma 2, at 191-98 (2000). The authors note that the presence of fungi in a home does not imply illnesses; nonetheless, "fungi have been associated with human-related illnesses." *Id.* at 196. The authors, however, conclude that it is difficult to prove an association between Stachybotrys and other microorganisms and health-related symptoms because "[t]he respiratory symptoms as well as other complaints of the patients may be due to a combination of dampness, pollution such as dust, fumes and smoke, and prolonged exposure including inhalation of mycotoxins from S. chartarum and/or

other microorganisms." *Id.* at 197. They also suggest further detailed case studies and that "a suitable animal model should be found for testing." *Id.* The authors do not discuss whether a particular level of exposure has led to symptoms – they refer to general causation (which is not at issue in this case). The authors discuss specific levels of exposure in their discussion of a link between Stachybotrys and pulmonary hemorrhage / hemosiderosis in infants. This injury, however, is not at issue in this case, and Dr. Bernstein does not address it in his findings. Thus, the Journal of Asthma article does not provide any information which is helpful in the second step of the toxicology methodology.

Dr. Bernstein also references an article from *Clinical Toxicology*. *See* Eckardt Johanning, *Stachybotrys Revisited*, 36 Clinical Toxicology 6, at 629-31 (1998). The letter from Dr. Johanning to the editor addresses a previous study which included a control group of twenty-one individuals with similar demographics and environmental history, except for employment in the problem building and exposure to Stachybotrys fungi. *Id.* at 629. The study was initiated after several employees reported to the Mount Sinai Medical Center with medical problems. *Id.* Several of these employees, either through direct physical contact with moldy materials or by working in the locations with the highest airborne Stachybotrys levels (from 116 to over 2,000 cfu), were diagnosed with chronic laryngitis, sinusitis, bronchitis, asthma, and allergy. *Id.* Although this link is significant, the author concludes that "[c]hronic, low to moderate level inhalation exposure has not been systematically studied and documented in the past." *Id.* at 630. He also states that indoor environmental exposures fluctuate inhalation doses over time, that there is a "lack of simple, reliable exposure indicator or a Stachybotrys disease biomarker," and that isolating exposure to Stachybotrys is difficult because Stachybotrys is generally found with other molds such as Penicillium and Aspergillus, of which there are several

hundred species with very different properties, mycotoxins, and allergenic potency. *Id.* Thus, the author acknowledges that no definable standard exists for determining whether an individual will react to exposure to various levels of different molds. This article does not provide Dr. Bernstein with any scientific basis as to specific causation – at best the article addresses only general causation.

At his deposition, Defendants questioned Dr. Bernstein on two articles that they forwarded to him prior to the deposition: an article from the National Center for Environmental Health ("NCEH") for the Center for Disease Control and Prevention ("CDC") and an article from the American College of Occupational and Environmental Medicine ("ACOEM"). The NCEH article, *What Are Molds . . .* , provides general information about various molds and their effects on human health. (*See* Bernstein Dep., Ex. 7.) The article states that some people are sensitive to molds, and that for those people, exposure to mold "can cause symptoms such as nasal stuffiness, eye irritation, or wheezing." *Id.* The article, however, summarizes that "Stachybotrys chartarum and other molds may cause health symptoms that are nonspecific. At present there is no test that proves an association between Stachybotrys chartarum and particular health symptoms." *Id.* Thus, this article, like the previous ones discussed herein, provides information only as to general causation – not specific causation. Nor does the article provide any data that medical doctors may use to determine whether their patients are suffering from exposure to molds or whether they are suffering from their allergies to pollen.

The article by the ACOEM also addresses general causation only and further undermines Dr. Bernstein's conclusions as to Plaintiffs' suffering from sick building syndrome. Bryan D. Hardin, *et al., Adverse Human Health Effects Associated with Molds in the Indoor Environment,*

ACOEM Evidence-based Statement of October 27, 2002. That articles provides:

> Residential or office fungal exposures may be a substantial factor in an individual's allergic airway disease depending on the subject's profile of allergic sensitivity and the levels of indoor exposures. Individuals with this type of mold allergy are "atopic" individuals, ie., have allergic asthma, allergic rhinitis [hay fever], or atopic dermatitis and manifest allergic (IgE) antibodies to a wide range of environmental proteins among which molds are only one participant. These individuals generally will have allergic reactivity against other important indoor and outdoor allergens such as animal dander, dust mites, and weed, tree, and grass pollens.

Id. at 2. The article also explains that "sick-building" syndrome is a poorly defined set of symptoms which are attributed to occupancy in a building; however, "despite a voluminous literature on the subject, the causal connection remains weak and unproven, particularly with respect to causation by mycotoxins." *Id.* at 4, 6. The article concludes that, despite the ability of Stachybotrys to produce mycotoxins, the multiple studies on the issue have failed to establish a connection between exposure to Stachybotrys and adverse human health reactions. *Id.* at 6. Thus, this article provides no scientific basis for specific causation: it provides no link between exposure to specific levels of specific molds and subsequent illnesses.

The article's statement that the presence of a toxigenic species of mold does not necessarily indicate that mycotoxins are also present[9], provides a basis for questioning

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[9] The article explains:

> Mycotoxins are "secondary metabolites" of fungi, which is to say mycotoxins are not required for the growth and survival of the fungal species ("toxigenic species") that are capable of producing them. The amount (if any) and type of mycotoxin produced is dependent on a complex and poorly understood interaction of

whether mycotoxins existed in the Roches' apartment. *See id.* at 4. This is significant because the P.K. Jarvis report on the cellulose extracted from the Roches' apartment showed the presence of mycotoxins on the cellulose sample. However, the test was perfomed at a laboratory, not at the Roches' apartment; thus, the test results, by themselves, are inconclusive as to whether the Stachybotrys present at the Roches' apartment was actually producing mycotoxins while the Roches lived in the apartment. This further undermines Dr. Bernstein's conclusions.

Although not directly relied upon by Dr. Bernstein at his deposition testimony or in his affidavit, Plaintiffs cite to several articles to support their theory of general causation. As stated previously, general causation is not at issue in this case; however, the articles Plaintiffs reference are significant because they state that there are no established standards to determine whether a particular mold caused a particular injury in an individual – no standards for determining specific causation. Plaintiffs reference the New York City Department of Health and Mental Hygiene's *Guidelines on Assessment and Remediation of Fungi in Indoor Environments* (the "*Guidelines*") for the proposition that molds can cause asthma, hypersensitivity, pneumonitis, allergic rhinitis, dermatitis, runny nose, eye irritation, cough, and congestion, and that "hypersensitivity pneumonitis may occur after repeated exposures to an allergen and can result in permanent lung damage." (Pls.' Mem. Opp'n at 12.) Although Dr. Bernstein has not diagnosed either Mr. Roche or

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factors that probably include nutrition, growth substrate, moisture, temperature, maturity of the fungal colony, and competition from other microorganisms. Additionally, even under the same conditions of growth, the profile and quantity of mycotoxins produced by toxigenic species can vary widely from one isolate to another. Thus, it does not necessarily follow from the mere presence of a toxigenic species that mycotoxins are also present.

Id. at 4.

Mrs. Roche with hypersensitivity pneumonitis, the *Guidelines* support Plaintiffs' theory of general causation; however, the *Guidelines* make clear that whether a particular individual develops symptoms when exposed to molds depends on a variety of factors: "the nature of the fungal material (e.g., allergenic, toxic, or infectious), the amount of exposure, and the susceptibility of exposed persons. Susceptibility varies with the genetic predisposition (e.g., allergic reactions do not always occur in all individuals), age, state of health, and concurrent exposures." New York City Department of Health and Mental Hygiene, *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, at ¶ 1.1, *available at* http://ww.ci.nyc.ny.us/html/doh/html/epi/moldrptl.html.
"For these reasons, and because measurements of exposure are not standardized and biological markers of exposure to fungi are largely unknown, it is not possible to determine 'safe' or 'unsafe' levels of exposure for people in general. *Id.* The *Guidelines* add that there are no currently available clinical tests to determine the source, place, or time of exposure to fungi or their products. *Id.* at ¶ 1.2. Furthermore, antibody testing is of limited value since individuals are exposed to molds in both outdoor and indoor environments. *Id.*

Another publication by the CDC is a statement by the Chief of the Air Pollution and Respiratory Health Branch for the National Center for Environmental Health at the CDC. Stephen C. Redd, M.D., *State of the Science on Molds and Human Health*, Statement for the Record Before the Subcommittee on Oversight and Investigations and Housing and Community Opportunity, Committee on Financial Services, United States House of Representatives (July 18, 2002). In his statement, Dr. Redd acknowledges that there are many unresolved questions about mold exposures but that "exposures to high levels of molds causes some illnesses in susceptible people." *Id.* at 1-4. Dr. Redd states that the Institute of Medicine ("IOM") has linked airborne molds to allergic rhinitis/

conjunctivitis, allergic asthma, and hypersensitivity pneumonitis and to exacerbations of asthma. *Id.* at 3. Dr. Redd, however, notes that:

> There are no accepted standards for mold sampling in indoor environments or for analyzing and interpreting the data in terms of human health. Molds are ubiquitous in the environment, and can be found almost anywhere samples are taken. It is not known, however, what quantity of mold is acceptable in indoor environments with respect to health. Because of difficulties related to sampling for mold, most studies have tended to be based primarily on baseline environmental data rather than human dose-response data. For these reasons, and because individuals have different sensitivities to molds, setting standards and guidelines for indoor mold exposure levels is difficult and may not be practical.

Id. at 9-10.

Thus, it is undeniable or clear that molds can have adverse health effects on a person; it is also evident from the literature, however, that there are no established standards to determine whether exposure to particular levels of particular molds will trigger an adverse health reaction.[10] In an attempt to correlate a specific level of mold

[10] *See* Pamela J. Davis, *Molds, Toxic Molds, and Indoor Air Quality*, California Research Board Note Vol. 8, No. 1 at 5-6 (March 2001) (stating that it is impossible to set exposure limits for molds that can be applied generally because of the variance in individual sensitivities and because of the vast array of molds (over 100,000) and explaining that

> A comprehensive review of available literature relating to the health effects of mold performed by the Federal-Provincial Working Group on Mycology Air Quality in Public Buildings (a Canadian Government sponsored group) showed that [several population-based studies] have consistently detected an association between respiratory symptoms and home dampness and mould (sic) growth, but causality in these studies has not been established.

found in the apartment with a government standard, Plaintiffs cite to the Occupational Safety and Health Agency ("OSHA") standard that indicates potential contamination in the air when there are 1,000 viable colony-forming units in a cubic meter of air. Plaintiffs cite the OSHA standard as 1,000 particles per cubic meter; however the correct standard is 1,000 colony-forming units in a cubic meter of air. (Defs.' Mem. Reply, Ex. 1.) (emphasis added). Comparing the Mold Investigation Report and the OSHA standard, the Court finds that no measurement exceeds the OSHA standard; therefore, there is no objective evidence of potential contamination.[11] The Court

(internal citations omitted)); N. Carlson, *Mycological Aspects of Indoor Air Quality*, http://www.dehs.umn.edu/iaq/fungus/mycoglos.html *1-*2 (Department of Environmental Health & Safety, University of Minnesota Apr. 29, 1996) (stating that there are no strict numerical guidelines for assessing whether an area is contaminated by mold, and that there are no standards in establishing a link between environmental exposure and the results of an allergy test because "[t]he antigenic material produced by a fungus or a particular genus will vary according to species or a strain within the species and vary with the source of nutrition for the organism"); The American Industrial Hygiene Association, *The Facts About Mold: For the Professional* at *2-*3, *available at* http://www.aiha.org/GovernmentAffairs-PR/html/mold-professional.htm (May 28, 2002) (stating that although dampness in buildings has been associated with respiratory problems, the extent to which mold contributes to this problem is unknown; explaining that there is an almost complete lack of information on specific human responses to well-defined exposures to mold; and concluding that "[u]ntil microbiological methods for demonstrating mold concentrations in the environment are standardized and reproducible, epidemiological studies necessary to determine dose-response can only suggest association, not cause and effect, with respect to mold exposures and health effects"); Berlin D. Nelson, *Stachybotrys chartarum: The Toxic Indoor Mold* at *7, *available at* http://www.apsnet.org/online/feature/stachybotrys (American Phytopathological Society Nov. 2001) (stating that scientists lack information about the relationship between exposure to bioaerosols of Stachybotrys, in quantity and duration of exposure, and the effects on human health).

[11] Notably, PETS found 1,056 spores per cubic meter of Stachybotrys in the living room – not colony forming units. (Mold Investigation Report at 5.) The measurements taken through bulk-sampling were

concludes that Dr. Bernstein offers no documented basis for linking the specific levels of mold found in the apartment to the Roches' symptomology.

iii. *Estimate of the Harm*

For the third step in the analysis, Dr. Bernstein combines the Mold Investigation Report, the literature, his anecdotal experience with patients that have been allegedly exposed to Stachybotrys, and his experience with patients that have suffered from "sick-building" syndrome to arrive at his conclusion on specific causation. (Bernstein Dep. at 92:13-19, 101:18-102:7.) Although PETS conducted the testing within the apartment, they provided no opinion as to how the various levels of exposure related to human health. The PETS report stated:

> While the severity of exposure is difficult to estimate, and no direct link between the occupants' health complaints and their exposure can be shown through the methods of this investigation, consideration should be given to the fact that the occupants' health complaints . . . are all consistent with well-defined case studies of chronic trichothecene intoxication.

(Mold Investigation Report at 6.) Therefore, the Mold Investigation Report provides nothing more than the levels of molds found in the apartment – the Report does not provide Dr. Bernstein with any findings or conclusions as to the severity of the exposure. Moreover, as discussed previously, Dr. Bernstein's reliance on the literature to establish specific causation is misplaced. And, as dis-

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reported as colony forming units per gram, not per cubic meter. (*Id.* at 5.) PETS reported the Anderson air sampling results in terms of colony forming units per cubic meter; however, none of those measurements exceeded the OSHA standard advanced by the Plaintiffs. (*Id.*) Also, PETS reported the wipe-sampling results in terms of colony forming units per square inch, not per cubic meter. (*Id.*) Thus, absent a direct comparison or a conversion table, none of these measurements exceed the OSHA standard.

cussed below, his consideration of anecdotal experiences does not support his opinion on specific causation. Thus, Dr. Bernstein fails to satisfy the third step in the methodology, and his inclusion of the various molds as suspected causes of the Roches' symptoms is not scientifically valid.

Dr. Bernstein testified that he had seen several patients allegedly exposed to Stachybotrys, and that, based on his anecdotal experience, he concluded that the Roches' symptoms were caused by their exposure to Stachybotrys. (*Id.* at 34:13-17, 36:8-20, 45:12-46:1, 54:9-14, 74:19-76:18.) However, Dr. Bernstein fails to explain how the specific exposure to the molds in the Westfield Village are similar in quantity and duration to any of the patients he has examined who have been exposed to Stachybotrys. Dr. Bernstein's position is further undermined by his own testimony; Dr. Bernstein explains his experience with other patients:

> For example, I'm seeing one patient, she has Stachybotrys in her basement, she's completely unaffected has no symptoms, she and her husband have no symptoms at all; in that situation there's no ventilation in the house; in other words, they have baseboard heat, so I think the fact that there's really not much circulation there as we alluded to by Mr. Dean earlier, is the reason why they may not be having symptoms; I'm seeing a large group of patients through another situation, where they were involved in a building that had significant Stachybotrys according to the industrial hygienist; . . . the ventilation is consistent, it's contained in the building, they had some people that were mildly ill, the what happened was they tried to remove the Stachybotrys, . . . ; they aerosolized everything, about 25 people became very ill in the building, and some of them – about 5 or 6 of them with the symptoms similar to the Roche's [sic]; so in that situation I think it's a combination of how much mold is pre-

sent, what are the mycotoxin levels and what's the ventilation system . . ."

(*Id.* at 75:10-76:18.) Dr. Bernstein fails to address the specific levels of exposure and how these levels are tied to his patients' suffering from various illnesses. Dr. Bernstein speculates that the ventilation system makes a difference on whether an individual becomes sick from exposure to Stachybotrys; however, this is merely his hypothesis – not a scientifically supportable conclusion. He further fails to explain why some individuals in the building scenario became mildly ill while others were not ill at all, where the building had constant ventilation. He also does not address the levels of exposure in that case – he merely states that the building had "significant" amounts of Stachybotrys. Dr. Bernstein provides no link between the Roches' specific exposure to molds and his experiences with other patients; he advances merely scientifically unsupported theories – speculations. Dr. Bernstein's anecdotal experience, while valuable to an ongoing study or to research, is not helpful in this instance because it does not support specific causation.[12]

In summary, Dr. Bernstein provides no scientific basis to rule in, as part of a differential diagnosis, the molds found in the Westfield Village apartment. As a result of the skin endpoint titration tests, Dr. Bernstein determined that Mr. Roche was not allergic to Aspergillus, Cladosporium, or Penicillium; thus, these molds cannot be ruled in to the analysis for Mr. Roche's symptomology. Mrs. Roche's skin endpoint titration test revealed that she was allergic to those three molds; therefore, the three molds may be ruled in as the suspected causes for her allergy and asthma symptoms. However, the literature re-

[12] "Where symptoms may be the subject of a variety of causes, it is insufficient for an expert to opine as to the cause of a symptom without some *scientific basis* other than his assertion of general experience." *Cali v. Danek Medical, Inc.*, 24 F. Supp. 2d 941, 951 (W.D. Wisc. 1998) (emphasis added).

lied upon by Dr. Bernstein fails to establish a link between a particular level of exposure and her symptoms; Dr. Bernstein takes a leap of faith and concludes that because general causation exists, then specific causation must also exist, without regard to the levels of exposure. There is no support in the scientific literature for this causation theory. With respect to the Stachybotrys, Dr. Bernstein conducted no testing, dismissed the RAS test as inconclusive, and ruled in the mold based on the literature and on his anecdotal experience. As with the other molds, there is ample evidence, within the literature, that Dr. Bernstein's inclusion of Stachybotrys is rejected by the scientific community as to specific causation. Accordingly, the Court finds that Dr. Bernstein failed to follow the accepted the toxicology methodology in ruling in the various molds as potential causes of the Roches' symptomology.

d. Ruling out Other Allergens

Assuming, arguendo, that Dr. Bernstein properly ruled in the various molds found in the apartment, he fails to rule out any of the other allergens to which the Roches were sensitive. The medical record and the tests performed by Dr. Bernstein suggest that the Roches were allergic to multiple allergens. Therefore, as part of the second portion of the differential diagnosis methodology, Dr. Bernstein must exclude the remaining allergens, or at least minimize the probability of the contribution of the remaining allergens to the Roches' symptomology. *See Cavallo*, 892 F. Supp. at 771.

At his deposition, on February 26, 2003, Dr. Bernstein stated that there were multiple explanations for the Roches' flu-like symptoms: "their allergic respiratory symptoms are multi-factorial of which mold may have been a contributing factor, ..." (Bernstein Dep. at 33:4-6.) Dr. Bernstein admitted, through questioning by Defense counsel, that he was not able to isolate the cause of the Roches' allergic reactions:

Q. When a person has lots of allergies, and then let's say, they're allergic to 15 to 20 things on the sheet that you have in front of you, and they come in with a complaint of nasal congestion; are you as an allergist able to tell which one of those things caused their nasal congestion?

A. No.

Q. Pardon me.

A. No.

Q. So there's (sic) many possibilities that you – You know their (sic) allergic to a lot of things, but you just could never tell which one actually is causing the problem; correct?

A. That's correct.

(*Id.* at 64:1-12.) In response to a question by Plaintiffs' attorney, Dr. Bernstein stated that

> There are a number of explanations which could explain the flu-like symptoms [the Roches] had, they could have had a micoplasma infection, they could have had an Epstein-Barr virus infection, . . . , it could be related to allergic symptoms and chronic mold exposure, it may related to mycotoxic symptoms; it is one of the explanations, I don't have – since not having all of their data at this point, and know all the workup that was done at that time; in other words, if I had seen them at that time, I would have done a workup to make sure that – The diagnosis of making this conclusion that you're asking is one of exclusion; therefore, we need to make sure that we need to exclude; retrospectively it is certainly a possible explanation for the patients' symptoms."

(*Id.* at 107:18-108:10.) On re-direct, Dr. Bernstein once again acknowledges that he had not excluded any of the other possible causes at the time of the deposition. (*Id.* at 133:3-15.) Dr. Bernstein's testimony demonstrates that

he believed there were other causes for the Roches' flu-like symptoms besides mold; he was, at that point, unable to exclude the other allergens.

Dr. Bernstein added that Mr. Roche smoked which is a non-specific irritant making allergy symptoms worse; he instructed Mr. Roche to quit smoking. (*Id.* at 20:15-20.) He also directed the Plaintiffs to get rid of their cat because they were both allergic to cats. (*Id.* Ex. 1.) Dr. Bernstein's position is further complicated by the fact that he examined the Roches nine months after their alleged exposure to the molds in the apartment.

Plaintiffs contend that Dr. Bernstein did not have all the information necessary to exclude all of the other allergens from his differential diagnosis. Even accepting this as true, Dr. Bernstein's affidavit, submitted after he received all of the information and was able to digest the medical records and test results, fails to set forth, in any detail, the factors that supported Dr. Bernstein's ruling out the remaining allergens and leaving the molds found in the apartment as the sole cause of the Roches' symptomology. Dr. Bernstein's testimony is similar to that of the internist in *Ballinger v. Atkins*, 949 F. Supp. 925 (E.D. Va. 1996). In *Ballinger*, the court barred the internist's testimony on *Daubert* grounds because the expert had conceded that there were multiple causes for the plaintiff's memory loss besides the brain damage: "[the internist] includes among those other possible causes sugar intolerance, latent hypoglycemia, psychiatric disorder, bowel disorder or even an intestinal parasite." 947 F. Supp. at 928. Similar to the situation in *Ballinger*, Plaintiffs in this case are allergic to multiple allergens beyond the molds found in the apartment – they are even allergic to their own cat. Dr. Bernstein's differential diagnosis fails to account for these alternate explanations, and the Court finds that his testimony is suspect and unsupported by science.

In addition to failing to exclude obvious alternate causes, Dr. Bernstein fails to set forth any of his findings at his deposition with a reasonable degree of medical certainty. Plaintiffs maintain that Dr. Bernstein's affidavit sets forth his conclusions with the requisite "reasonable degree of medical certainty." However, at his deposition, Dr. Bernstein testified that he lacked any knowledge as to what a "reasonable degree of medical certainty" entailed. (Bernstein Dep. at 53:15-56:9., 89:7-90:2.) In *Ballinger*, the court noted that the internist was unable to present any opinion "with a reasonable degree of certainty." *Id.* The Court finds the present situation similar to that in *Ballinger*: Dr. Bernstein fails to rule out obvious and commonly found allergens, and he fails to set forth any findings with the requisite "reasonable degree of medical certainty." Dr. Bernstein's differential diagnosis is unsupported by the record and is scientifically invalid.

e. Summary

While the methodology of differential diagnosis is scientifically valid, in this instance, Dr. Bernstein has failed to faithfully apply the methodology to the facts. First, Dr. Bernstein does not rule in Aspergillus, Cladosporium, and Penicillium as to Mr. Roche because he was not allergic to these molds. Second, although Mrs. Roche was allergic to Aspergillus, Cladosporium, and Penicillium, Dr. Bernstein's reliance on the literature addressing general causation is misplaced because the literature provides no scientific support for specific causation. Third, Dr. Bernstein did not test the Roches for sensitivity to Stachybotrys, and he dismisses the Stachybotrys test the Roches had previously undergone as inconclusive. Fourth, the literature upon which he relies provides no support for his leap from general causation to specific causation given the specific molds, the specific levels of exposure, and the Roches' medical history. Also, his anecdotal experience is insufficient to support specific causation in light of the authoritative conflicting scientific literature. Fifth, he fails

to properly rule out other allergens and to provide any opinion, at his deposition, with the requisite "reasonable degree of medical certainty."

Dr. Bernstein concludes, in his affidavit, that the Roches became sensitized to molds through their exposure. (Bernstein Aff. at ¶ 6.) His conclusion, however, is belied by the deposition record. During his deposition, Dr. Bernstein testified that it was possible for the Roches to have become sensitized to molds which would contribute to their allergic symptoms; he acknowledged, however, that in order to determine sensitization he would have had to test the Roches for allergic reactions to molds prior to their moving into the apartment. (Bernstein Dep. at 33:7-17.) And, he fails to provide any basis in his affidavit that supports his conclusion of sensitization. Thus, his conclusion as to sensitization is untenable.

In his affidavit, Dr. Bernstein states that he received blood test results, CAT scan results, MRI results, and X-rays on both Mr. and Mrs. Roche. (Bernstein Aff. at ¶ 2.) However, he provides no explanation on how his consideration of these records contributed to his determination that the Roches' symptoms came about as a result of their exposure to molds. The Court concludes that there is no support in the medical record or in the scientific literature for Dr. Bernstein's conclusion as to specific causation: Dr. Bernstein has unjustifiably extrapolated from the medical record and the scientific literature his unfounded conclusion[13] and has failed to account for obvious alternate explanations.[14]

3. Temporal Proximity as the Primary Theory for Proximate Causation

It is clear that Dr. Bernstein does not follow a differential diagnosis methodology in formulating his opinion on

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[13] *See* note 2, *supra*.

[14] *See* note 3, *supra*.

proximate causation in this case. Dr. Bernstein relies primarily upon the temporal relation of the Roches' exposure to the alleged toxic molds to the onset and worsening of their physical problems to reach his opinion on proximate causation. (Bernstein Aff. ¶ 6.) He states that Mr. and Mrs. Roche were asymptomatic prior to moving into the Westfield Village apartment and that "their symptoms were caused by their exposure to molds, and that they became sensitized to molds and developed allergies to molds as a result of living in a contaminated apartment." (*Id.*) The Court finds that Dr. Bernstein's primary reliance is neither supported by the record, nor does it meet the *Daubert* standards.

The record reveals that Mrs. Roche was not asymptomatic prior to her arrival at the apartment. Mrs. Roche suffered from asthma since she was child. (Bernstein Dep. at 31:1-20.) Mrs. Roche visited the emergency room on several occasions complaining of flu-like symptoms before she moved into the apartment: March 4, 2001 (bronchitis), October 14, 1999 (sinusitis), August 26, 1999 (pharangitis), and July 6, 1999 (sinusitis). The Roches moved into the Westfield Village apartment on April 4, 2001. Thus, one month prior to moving into the apartment, Mrs. Roche had suffered from bronchitis – this can hardly be construed as "asymptomatic." In his opinion, Dr. Bernstein fails to provide any explanation as to how he dismisses Mrs. Roche's medical history and concludes that she was asymptomatic prior to April 2001. Dr. Bernstein provides no evidence or testimony as to how exposure to the molds made Mrs. Roche's asthma worse. In addition, he examined the Roches, for the first time, nine months after they had moved out of the apartment. Dr. Bernstein's conclusion that Mrs. Roche was asymptomatic prior to April 2001 is scientifically untenable in light of the record.

An opinion based primarily, if not solely, on temporal proximity does not meet *Daubert* standards. *See Cavallo*,

892 F. Supp. 756. In *Cavallo*, the court opined that "[a]t bottom, [the expert's] opinion is founded primarily on the temporal connection between the spill and the development of Ms. Cavallo's symptoms, as well as on his subjective, unverified, belief that AvJet can cause the types of injuries from which Ms. Cavallo suffers. This is not the method of science." 892 F. Supp. at 773; *see also Schmaltz*, 878 F. Supp. at 1122 ("it is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [Rule] 702"); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1238-39 (D. Colo. 1998) (discussing how temporal relationship itself did not provide evidence of causation); *In re Swine Flu Immunization Prod. Liab. Litig.*, 533 F. Supp. 567, 567 (D. Colo. 1980) (same); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1249 (E.D.N.Y. 1985) (same).

Plaintiffs contend:

> In *Westberry*, [the defendant] claimed that the doctor had no scientific literature on which to rely to "rule in" talc as a possible basis for [plaintiff's] sinus condition, but the Court pointed out that it was undisputed that inhalation of high levels of talc irritates mucous membranes. 178 F.3d at 264. Likewise, in the Roche [sic] case it is undisputed that toxic mold causes the type of injuries that Plaintiffs suffered as set out in all of the Plaintiffs [sic] Memorandums [sic] herein [sic] from the EPA, CDC, etc. [sic] and the [D]efendants' own mold policies. "Further, although Dr. Isenhower did not point to [the plaintiff's] exposure to a specific level of airborne talc, there was evidence of substantial exposure." 178 F.3d at 264. Ginste testified that the [S]tachybotros [sic] levels were extremely elevated, causing the families to be told to immediately evacuate. (Ginste Dep. at 185-86.)

(Pls.' Surrebuttal Mem. at 11.) The Court, however, finds this argument inapposite in light of the facts of this case.

The expert in *Westberry* was the plaintiff's treating physician who had treated the plaintiff prior to his exposure to the talc in question. Also, the treating physician experimented with keeping the plaintiff out of work and noticed that his sinus condition would improve when not working and would worsen when he returned to work. 178 F.3d at 265. In this case, Dr. Bernstein examined and treated the Roches nine months after they left the apartment. He was not treating the patients either prior to their moving into the apartment, or while they lived in the apartment. The record does not demonstrate that Dr. Bernstein conducted the same type of testing that Dr. Isenhower performed in *Westberry*. Dr. Bernstein, in addition, fails to provide any scientific or medical explanation for his opinions. In *Westberry*, there was ample evidence before the court that the plaintiff had been exposed to severe concentrations of talc, which the court found to be a sinus irritant. Here, Mr. Ginste testified that the Roches had been exposed to "severe" mold concentrations; however, not all mold spores are allergens and not all molds produce mycotoxins. Plaintiffs did not proffer any reliable tests of the levels of mold spores present in the apartment. The Court finds notable and considerable differences between this case and *Westberry*. The Court concludes that Dr. Bernstein fails to provide an adequate methodology for his conclusions on proximate causation, and his primary reliance on temporal relationships is scientifically invalid.

III. CONCLUSION

The Court concludes that Dr. Bernstein fails to "provide any evidence that a particular mold in the [apartment] had a greater possibility than cigarettes, dust mites, fibers, [cat dander], . . . , or any number of present environmental allergens, of causing health effects in [the Roches]. *Flores v. Allstate Texas Lloyd's Co.*, 229 F. Supp.

2d 697, 702 (S.D. Tex. 2002). The Court holds that Dr. Bernstein failed to adhere to the established methodology of differential diagnosis. His sole reliance on temporal relation is insufficient to satisfy the requirements of *Daubert* and its progeny. Dr. Bernstein's testimony is scientifically invalid. Accordingly, the Court excludes Dr. Bernstein's testimony as to proximate causation for the Roches' injuries as inadmissible.

An appropriate order with respect to the motion to bar the testimony of Dr. Bernstein will issue forthwith.

The Clerk is directed to forward a copy of this Memorandum Opinion to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

ORDER

THIS MATTER is before the Court on Defendants', Lincoln Property Company ("Lincoln") and the State of Wisconsin Investment Board ("SWIB"), motions to bar the testimony by Richard Bernstein, M.D. For the reasons stated in its Memorandum Opinion of July 25, 2003, the Court grants Defendants' motion to bar the testimony of Dr. Bernstein; therefore, it is hereby

ORDERED that Defendants, Lincoln Property Company's and the State of Wisconsin Investment Board's, Motions to Bar the Testimony of Richard Bernstein, M.D., are GRANTED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND
SWIB INVESTMENT CO.,
Defendants.

[Filed July 25, 2003]

JUDGMENT

THIS MATTER is before the Court on Plaintiffs', Christophe and Juanita Roche, and Defendants', Lincoln Property Company and the State of Wisconsin Investment Board, motions for summary judgment on all of Plaintiffs' claims. In its previous Order of July 25, 2003, the Court granted Defendants' motion for summary judgment as to all of Plaintiffs' claims and denied Plaintiffs' motion for summary judgment. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants Lincoln Property Company and the State of Wisconsin Board and against Plaintiffs Christophe and Juanita Roche.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 25th day of July, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
07/25/03

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed Aug. 11, 2003]

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiffs Christophe and Juanita Roche's motions for post-judgment relief: (1) motion to remand pursuant to 28 U.S.C. § 1447(c) and (2) motion to set aside judgment as void under Rule 60(b)(4) of the Federal Rules of Civil Procedure. This case concerns Plaintiffs Christophe and Juanita Roche's claim that Defendants failed to properly maintain their apartment, that such failure allowed toxic levels of mold to develop in various areas of the apartment, and that these toxic mold levels caused Plaintiffs and their family, including their pets, various personal and monetary injuries. The issue before the Court in the motion to remand is whether Defendant Lincoln Property Company ("Lincoln") is a citizen of Virginia and henceforth not a diverse party. The Court holds that Lincoln is not a citizen of Virginia, but a citizen of Texas, because Lincoln is registered as a Texas corporation with its principal place of business in Texas. Furthermore, Lincoln's partnership, which

manages the Westfield Village Apartments in Virginia, is a citizen of Texas because all of its partners are citizens of Texas.

The issue before the Court on Plaintiffs' motion for relief pursuant to Rule 60(b)(4) is whether the State of Wisconsin Investment Board ("SWIB") is an arm of the State of Wisconsin and, henceforth, not subject to diversity jurisdiction in a federal court. The Court holds that SWIB is subject to diversity jurisdiction because SWIB is an independent agency, not an arm of the State of Wisconsin, with the power to sue and be sued. Furthermore, the Wisconsin Court of Appeals held, in *Bahr v. State of Wisconsin Investment Board*, 521 N.W.2d 152 (Wisc. Ct. App. 1994) *review denied* 525 N.W.2d 733, that SWIB was not entitled to sovereign immunity because it was an agency with independent proprietary powers and functions. For the reasons stated herein, the Court denies the motion to remand and the motion to set aside the judgment pursuant to Rule 60(b)(4).

I. BACKGROUND

On August 22, 2002, Plaintiffs filed Motions for Judgment against Lincoln Property Company, t/a Lincoln Property Company ECW, Inc., and SWIB in the Circuit Court for Fairfax County. On September 17, 2002, Defendants removed the case to this Court based on the diversity of citizenship of the parties, pursuant to 28 U.S.C. §§ 1441 and 1332. In March 2003, the parties filed motions for summary judgment. On April 16, 2003, the Court entered an Order granting Defendants' motion for summary judgment and informing the parties that the Court would render a thorough ruling in the near future. By Memorandum Order dated July 25, 2003, the Court rendered its decision in the case and entered judgment in favor of the Defendants as to all counts in the Second Amended Complaint; the Court also entered judgment in favor of Defendants on that same day. Subsequent to the initial ruling, but before the Memorandum Order and

Judgment, Plaintiffs filed a motion to remand the case to state court on the basis that the Court lacked subject matter jurisdiction because Lincoln was a citizen of Virginia. On May 2, 2003, Plaintiffs filed a motion for Rule 60(b)(4) relief on the basis that SWIB was not subject to diversity jurisdiction because SWIB was an arm of the State of Wisconsin.

II. DISCUSSION

A. Motion to Remand

In accordance with 28 U.S.C. § 1447, "[i]f at any time before final judgment if appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Plaintiffs assert that this Court is without subject matter jurisdiction because Defendant Lincoln is not a Texas corporation, is not a corporation at all, but rather a partnership with a partner who is a Virginia resident. (Pls.' Mem. Supp. Mot. to Remand at 2.) Plaintiffs contend that Defendant Lincoln misrepresented its state of citizenship in its Notice of Removal. (*Id.* at 3) Plaintiffs base their arguments on: (1) the deposition of Fred E. Chaney, Lincoln's Rule 30(b)(6) designee, who allegedly stated that Lincoln was a partnership and not a company; (2) the deposition of John LeBeau, Vice President of the Mid-Atlantic Regional Division of Lincoln, who identified Jeff Franzen as a Senior Vice President, partner, in Lincoln Property Company; (3) Lincoln's corporate website identifying Jeff Franzen as a "partner"; (4) certificates from the State Corporation Commission certifying that Lincoln Property Company is neither authorized nor registered to conduct business in Virginia and certifying that EQR/Lincoln Limited Partnership is an authorized and registered partnership in Virginia; (5) and the Fairfax County Tax Assessment Office records demonstrating that Jeff Franzen is a resident of Fairfax County, Virginia.

The Plaintiffs' reliance on these documents for their arguments is misplaced for several reasons. First, the en-

tity Plaintiffs identified in their Motion for Judgment filed in state court is Lincoln Property Company, located at 3300 Lincoln Plaza, 500 North Akard Street, Dallas, Texas 72501. This corporation is a Texas corporation with its principal place of business in Texas. (Dan M. Jacks Decl., Ex. 1(A)-(E).) Therefore, the entity that Plaintiffs sued is a Texas corporation. Lincoln Property Company is not a citizen of Virginia since the company is not registered to conduct business in Virginia. Second, Mr. Chaney actually testified that Lincoln operates under many different structures and that he is a partner in new deals. (*See* Fred E. Chaney Dep. at 4:15-5:3.) Mr. Chaney did not testify that the Defendant Lincoln was a partnership of whom he is a partner. Third, Mr. Franzen was not a partner of either Defendant Lincoln or its subsidiary EQR/Lincoln Limited Partnership ("EQR"), the partnership responsible for collecting management fees for the Westfield Village apartments. Mr. LeBeau's testimony demonstrates that he knew Mr. Franzen's title, but he did not know of whom Mr. Franzen was a partner. (*See* LeBeau Dep. at 21:2-10.) The corporate website does not specify the partnership to whom Mr. Franzen belongs. Thus, this evidence fails to demonstrate that Mr. Franzen was a partner in either the Defendant Lincoln or its subsidiary EQR. Mr. Franzen is actually a partner in several limited partnerships that are involved in the acquisition and development of properties, not any partnership involved in this case. (Defs.' Mem. Opp. Mot. to Remand at 6-7.) Therefore, Mr. Franzen's citizenship is immaterial.

Fourth, even if EQR is the proper defendant in this case (although Plaintiffs did not sue this entity), EQR is not a citizen of Virginia. For the purposes of determining diversity jurisdiction, a limited partnership's citizenship is determined by reference to the citizenship of each of its partners. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 192-93 (1990). EQR is a partnership registered and operating under the laws of Delaware. Furthermore, EQR's partners are: (1) Lincoln Eastern Management Corporation,

which is incorporated in Texas and maintains its principal place of business in Texas, and (2) Lincoln Placeholder Limited Partnership, which is a Texas partnership. (Jacks Decl., Ex. 1(C) and (D).) In addition, Lincoln Placeholder Limited Partnership's partners are Lincoln Eastern Management Corporation and Lincoln E.C.W. Property Management, Inc., a Texas corporation with its principal place of business in Texas. (Jacks Decl., Ex. 1(D and E).) Therefore, EQR is a citizen of Texas and no other state; and, even assuming that EQR is the proper defendant, EQR's citizenship is diverse from the Plaintiffs. Although Plaintiffs contend in their Rule 60(b) motion that SWIB is not a citizen of Wisconsin for diversity purposes, for the reasons stated, *infra*, the Court concludes that SWIB is a citizen of Wisconsin and amenable to diversity jurisdiction. For the foregoing reasons, the Court concludes that Lincoln, a Texas corporation, or EQR, a Texas partnership, are not citizens of Virginia and that the Defendants are diverse from the Plaintiffs. Removal was proper in this case, and the Court, having decided the matter on its merits, denies Plaintiffs' motion to remand.

B. Motion for Relief under Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party, on motion and upon such terms as are just, from a final judgment if the judgment is void. Fed. R. Civ. P. 60(b)(4). Plaintiffs contend that the Court's judgment of July 25, 2003, is void because SWIB is an arm or the alter ego of the State of Wisconsin and, therefore, not amenable to suit in federal court based on diversity jurisdiction. As stated in *Moor v. County of Alameda*, 411 U.S. 693 (1973), a state is not a citizen for purposes of diversity jurisdiction. Moreover, a political subdivision of a state, unless it is an arm or the alter ego of the state, is a citizen of the state for diversity purposes. *Id.* at 717. Thus, the issue before the Court is whether SWIB is to be treated as an arm of the state or is instead to be treated as a municipal corporation or

other political subdivision amenable to jurisdiction based on diversity of citizenship. The Court holds that SWIB is not an arm of the State of Wisconsin; SWIB is an independent corporate body created under the laws of Wisconsin and subject to diversity jurisdiction.

Although not on all fours with the issue before the Court, the Court utilizes the analysis employed in Eleventh Amendment immunity cases to determine whether SWIB is an independent agency or an arm of the State of Wisconsin. In order to determine whether SWIB is an arm of the state, the Court must undertake an examination of SWIB's relationship to the State of Wisconsin. "The principal factor, upon which courts have virtually always relied, is whether a judgment against the governmental entity would have to be paid from the state's treasury." *Cash v. Granville Cnty Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001). A finding that a judgment against the particular entity would not be paid from the state's treasury weighs against a finding that the entity is immune. *Id.* at 224. However, such a finding is not dispositive of the matter; and the Court must then consider three additional factors: "(1) the degree of control that the state exercises over the entity or the degree of autonomy from the state that the entity enjoys; (2) the scope of the entity's concerns – whether local or statewide – with which the entity is involved; and (3) the manner in which state law treats the entity." *Id.*

The first question is whether a judgment against SWIB would affect the Wisconsin state treasury. This inquiry requires a brief explanation of SWIB's structure. SWIB manages over forty separate investment funds. (Aff. Keith Johnson, Ex. 1.) Some of these funds consist of money from various state agencies, some are comprised of money from municipalities and other non-state level entities, still other funds consist of money from current and former state employees. (*Id.*) Although SWIB manages both state and private funds, each fund is managed sepa-

rately; and, per statute, the expenses associated with the management of each fund, including any liabilities, are assessed against the fund for which the services were furnished or the liabilities incurred. *See Bahr*, 521 N.W.2d at 158 ("In each instance, the expenses incurred in the exercise of these powers are to be paid by the board out of the current income of the particular fund for which the action was taken; no state-appropriated funds are involved.") Relating specifically to this action, the Wisconsin Retirement System – Fixed Investment Trust (the "Trust") was the fund that owned the Westfield Village apartments; thus, any liabilities arising from this case would be paid out of this fund. (Johnson Aff., Ex. 1 at ¶ 9.) The funds contained within the Trust are retirement funds for current and former state employees. (*Id.* at ¶ 7.) As stated by Wisconsin's Attorney General, "Monies paid into Employee Trust Funds are not State Funds." 1 Op. Att'y Gen. Wisc. 95, 2 (February 14, 1995). Therefore, a judgment against SWIB in this case would not affect the State of Wisconsin's treasury, but only the employee retirement fund. Having found that the first question is not dispositive, the Court now considers the three remaining factors addressed in *Cash*.

Considering the degree of control the State of Wisconsin exercises over SWIB, the Court finds that SWIB is an independent and autonomous entity. First, the Wisconsin legislature has expressly declared its intent that SWIB be "an independent agency of the state which is to manage money and property for the state, its agencies and trust funds," with the goal of "accomplishing the purpose of each trust or fund." Wis. Stat. § 25.15(1) (2001). Second, the legislature declared that SWIB was "a body corporate with the power to sue and be sued in said name." Wis. Stat. § 25.17 (2001). Although the fact that the legislature declared that SWIB has the power to sue and be sued

is not dispositive[15], its declaration that SWIB is a body corporate evinces an intent that SWIB is a corporation – separate and distinct from the state – and a citizen of Wisconsin for diversity jurisdiction purposes. Third, in its opinion in *Bahr*, the Wisconsin Court of Appeals found that the various statutes governing SWIB's operations provide SWIB with considerable autonomy from the state in its investment decisions.[16] 521 N.W.2d at 157-58. That court ultimately concluded that SWIB could not raise the defense of sovereign immunity in a state court action seeking declaratory relief. *Id.* at 159. Therefore, the Court finds that SWIB exercises considerable autonomy from the state.

As to the scope of SWIB's concerns (local versus state-wide), the Court finds that this factor favors a finding that SWIB is not an arm of the state. SWIB manages investments on behalf of state agencies, local entities, and state and local employees. Thus, SWIB's concerns are directly reflected by the particular fund in question – the employee retirement trust funds in this instance. This fund is not concerned with either local or state-wide inter-

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[15] *See Martin v. Univ. of Louisville*, 541 F.2d 1171 (6th Cir. 1976) (holding that Kentucky statute giving University of Louisville power to sue and be sued in its corporate name did not constitute a waiver of that state's Eleventh Amendment immunity); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976) (same).

[16] Section 25.17(1) provides grants SWIB the "exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from" the forty-one funds. Section 25.18(1)(a) authorizes SWIB to employ special counsel "in any matters arising out of the scope of its investment authority," with the expenses assessed to the current income of the fund for which the services were provided. Section 25.18 also authorizes SWIB to execute instruments, indemnify against its failures and losses, to secure insurance against any risks relating to its functions, to liquidate any corporation in which it owns 100% of the stock, to sell and purchase stock, and to employ contractors or other agents "necessary to evaluate or operate any property" in which it or a fund it manages has an interest. *Bahr*, 521 N.W.2d at 157-58.

ests, but the interests of current and future retirees at the local and state level. Thus, SWIB, in this instance, has concerns that pertain solely to private individuals.

Finally, the last factor weighs in favor of a finding that SWIB is not an arm or the alter ego of the state. As a matter of Wisconsin law, SWIB is an "independent agency of the state." Wisc. Stat. § 25.15(1). As previously discussed, the only Wisconsin court to have addressed SWIB's status as an arm or alter ego of the state found that SWIB was "the type of independent going concern long held to be ineligible to raise the defense of sovereign immunity." *Bahr*, 521 N.W.2d at 159. Therefore, it is undeniably clear that SWIB is not an arm of the State of Wisconsin. Moreover, SWIB is a body corporate with the power to sue and be sued. The Court concludes that, in light of the Wisconsin Court of Appeals' decision in *Bahr* and the various Wisconsin statutes cited herein, SWIB is an independent citizen of Wisconsin, diverse in citizenship from the Plaintiffs, and subject to this Court's subject matter jurisdiction.

III. CONCLUSION

In the interests of justice, the Court has addressed both of Plaintiffs' post-judgment motions; however, the Court is obliged to note several procedural deficiencies in Plaintiffs' motion practice. Plaintiffs filed their Motion to Remand pursuant to 28 U.S.C. § 1447(c) on April 22, 2003; Plaintiffs also filed a memorandum addressing Lincoln's alleged lack of diversity of citizenship with the Plaintiffs. Defendants responded on April 30, 2003. However, on that same day, Plaintiffs filed an "Addendum" to their motion. Plaintiffs addressed, in the Addendum, how SWIB was an arm of the State of Wisconsin and not a citizen of Wisconsin for diversity purposes. Plaintiffs, however, fail to provide any rule of law supporting the timing of their last-minute filing.

The Court concludes that Lincoln, a Texas corporation, or EQR, a Texas partnership, are not citizens of Virginia

and that removal of this case was proper. Furthermore, SWIB is an independent citizen of Wisconsin, diverse in citizenship from the Plaintiffs, and subject to this Court's subject matter jurisdiction. The Court holds that Lincoln was a citizen of Texas and SWIB a citizen of Wisconsin; furthermore, the Defendants have diverse citizenship from the Plaintiffs who are citizens of Virginia. Thus, it is hereby

ORDERED that Plaintiffs Christophe and Juanita Roche's Motion to Remand Pursuant to 28 U.S.C. § 1447(c) is DENIED. It is further

ORDERED that Plaintiffs Christophe and Juanita Roche's Motion for Rule 60(b) Relief from an Order of Judgment That is Void is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 11th day of August, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/11/03

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 02-1390-A

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Plaintiffs,

v.

LINCOLN PROPERTY CO. AND SWIB INVESTMENT CO.,
Defendants.

[Filed Sept. 3, 2003]

ORDER

THIS MATTER is before the Court on (1) Plaintiffs' motion for reconsideration of the Court's Order entering summary judgment in favor of the Defendants Lincoln Property Company and SWIB Investment Company and (2) Plaintiffs' motion for reconsideration of the Court's Order of August 11, 2003. The Court has reviewed the parties' submissions regarding these motions and their previous submissions regarding the motions for summary judgment and other post-judgment motions. The Court finds that Plaintiffs do not advance any new authority to support their renewed arguments. Plaintiffs merely cast the undisputed facts in a different light.

Furthermore, Plaintiffs ask the Court to review the previous filings connected with its motion to remand and to reconsider the reasons set forth therein as a basis for reconsideration. The Court fails to find a rule of law which allows a party to file a motion to reconsider based on arguments set forth in the previously decided motion

without providing more than a regurgitation of the law and the facts. Plaintiffs fail to provide any basis for relief pursuant to Federal Rule of Civil Procedure 59(e).

The Court concludes that Plaintiffs' arguments do not create a genuine issue of material fact "sufficient to survive a motion for summary judgment." *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). The Court has dealt with these arguments and issues in its Memorandum Order of July 25, 2003, and in its Memorandum Order of August 11, 2003. Therefore, it is hereby

ORDERED that Plaintiffs' Motion for Reconsideration of Order Entering Summary Judgment in Favor of Defendants Lincoln Property Company and SWIB Investment Company is DENIED. It is further

ORDERED that Plaintiffs' Motion to Reconsider the Court's Memorandum Order of August 11, 2003, is DENIED.

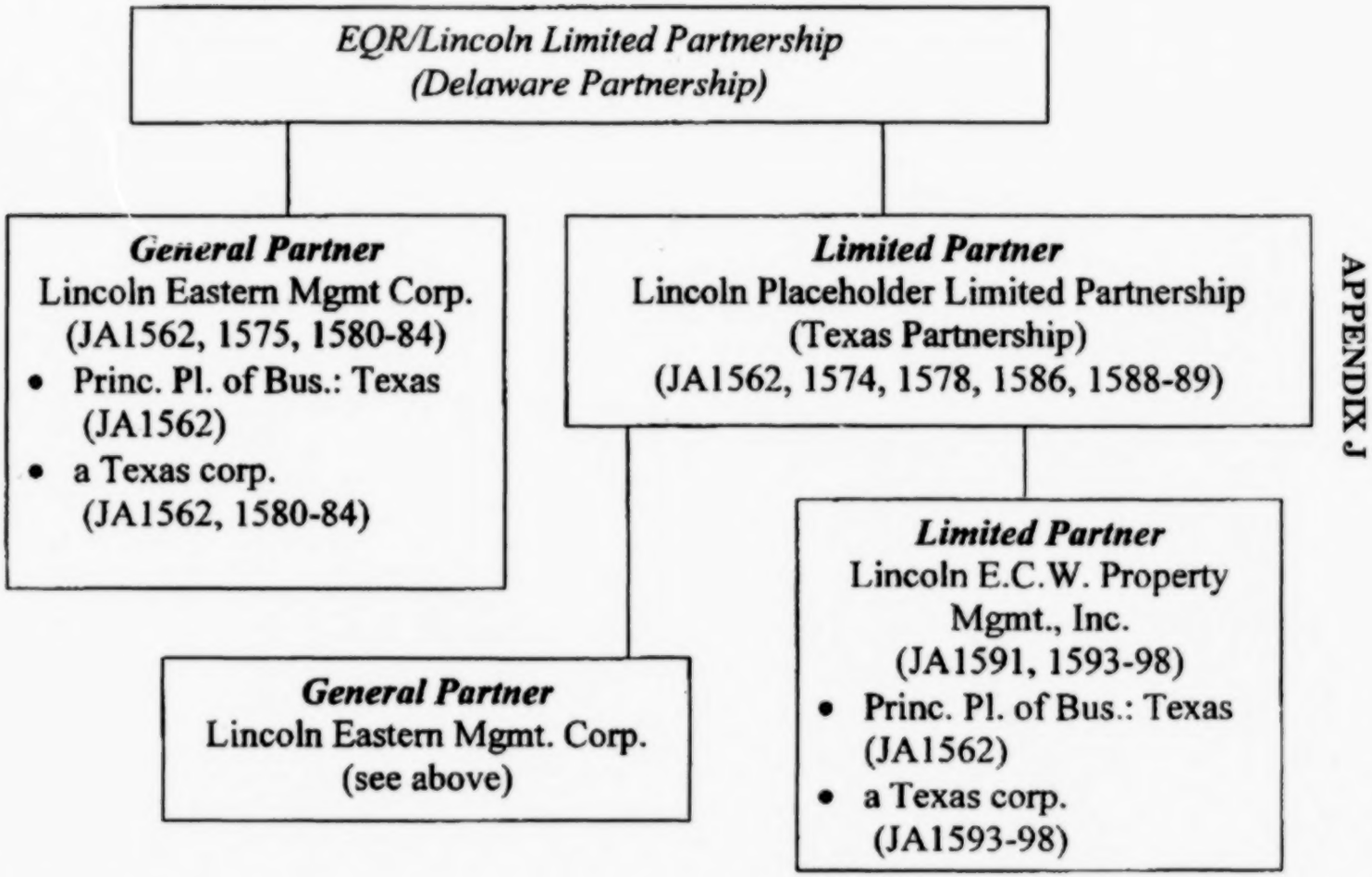
The Clerk is directed to forward a copy of this Order to counsel.

Entered this 3rd day of September, 2003.

/s/ GERALD BRUCE LEE

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
09/03/03



Thus, the Opinion clearly erred in holding that no record evidence established the identity and non-Virginia citizenship of EQR's limited partners. LPLP was plainly identified as the limited partner in EQR, and it was further plainly identified as a Texas partnership.[8] Petitioners more than met their burden of demonstrating that EQR was a Texas partnership diverse to the Roches.

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[8] The Court's criticism that the district court "did not determine the citizenship of the real parties in interest," referring to EQR (Op. at 10), also is not correct. The district court expressly found that, even if EQR were the "real party in interest," diversity jurisdiction would still exist because EQR was a Texas partnership for the purposes of diversity jurisdiction. See JA1975-76.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2064
CA-02-1390-A

CHRISTOPHER ROCHE; JUANITA ROCHE,
Plaintiffs-Appellants,

v.

LINCOLN PROPERTY COMPANY;
SWIB INVESTMENT COMPANY,
Defendants-Appellees.

AND

INVESCO INSTITUTIONAL,
Defendant.

[Filed July 27, 2004]

On Petition for Rehearing and Rehearing En Banc

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Gregory, and Judge Beam.

For the Court,

/s/ PATRICIA S. CONNOR
Clerk

APPENDIX L

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 18, 2004

Mr. David C. Frederick
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: Lincoln Property Company, et al.
v. Christopher Roche, et al.
Application No. 04A298

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on October 18, 2004 extended the time to and including November 24, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]

APPENDIX M

STATUTES INVOLVED

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except

that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the

United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not

be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 17 provides:

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on be half of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.